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No. 74-687

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN AND PIPE COMPANY, AND EMSCO SCREEN AND PIPE COMPANY OF TEXAS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* 15–24) is reported at 497 F. 2d 976. The order of the district court (App. C, *infra,* 27–30) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1974 (App. B, *infra,* 25–26). On October 16, 1974, Mr. Justice Powell extended the time for

filing a petition for a writ of certiorari to November 23, 1974, and on November 18, 1974, he further extended the time to December 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an obligation to the United States arising from a government contractor's breach or default occurring prior to its insolvency is disentitled to the statutory priority for "debts due to the United States" solely because the amount owing has not been finally ascertained at the time of the insolvency.

STATUTES INVOLVED

Section 5 of the Act of March 3, 1797, 1 Stat. 515, as amended, 31 U.S.C. 191, provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Section 65 of the Act of March 2, 1799, 1 Stat. 676, as amended, 31 U.S.C. 192, provides:

> Every executor, administrator, or assignee, or other person, who pays, in whole or in part,

> any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

STATEMENT

The facts are undisputed and are summarized in the court of appeals' opinion (App. A, *infra*, 15–24).[1] In June 1966, Emsco Screen and Pipe Company of Texas, Inc. ("Emsco") entered into three government contracts. One was with the Navy to supply certain fabricated items for a contract price of $210,231.18 with deliveries to commence October 1966 and end during June 1967. On August 5, 1966, Emsco notified the Navy that the contract would be "impossible to perform" unless progress payments not then called for by the contract could be made.[2] The Navy treated Emsco's letter as a repudiation and abandonment of the contract and formally terminated the contract on August 31, 1966. On November 23, 1966, the Navy reprocured the contract with excess costs of $40,607.13 (not including interest).

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[1] The facts are set forth in detail in a stipulation of the parties dated May 28, 1973, and the opinion of the Armed Services Board of Contract Appeals (Nos. 11917, 12184), dated May 29, 1969, disposing of respondent Emsco's claim concerning one of the contracts involved here.

[2] A full statement of the difficulties involved with the progress payments and Emsco's failure to deliver for the Navy is found in the opinion of the Armed Services Board of Contract Appeals.

In the second, Emsco contracted with the Army to deliver by December 1966 certain manufactured products for a contract price of $27,428. Emsco repudiated this contract too in August 1966 and did not deliver; the Army officially terminated the contract on December 6, 1966, with a claim due at that time of $4,272. The parties reached a settlement of $5,000 in 1968.

In the third, Emsco contracted with the Defense Supply Agency ("DSA") to supply certain products for a contract price of $72,637.50 to be delivered by August 1966. Since Emsco did not deliver, DSA terminated the contract on October 19, 1966, and reprocured on January 7, 1967, at an additional cost of $8,436.06. In 1968, settlement reduced the claim to $6,072.82.

On October 20, 1966, Emsco made a voluntary assignment for the benefit of creditors to respondent Thomas W. Moore, Jr., in which the United States did not join. On October 20, 1966, Emsco had $55,707.38 in assets and, in addition to the amount involved in this case, owed $5,992.73 to the City of Houston and $68,758.91 to 61 other creditors.[3] Emsco stipulated that its obligations, and in fact the claims of the 61 creditors consenting to the assignments were themselves greater than Emsco's assets.

In February 1972, the United States filed suit in the United States District Court for the Southern District of Texas against the assignee and Emsco claiming priority under 31 U.S.C. 191 and 192 for

[3] Respondents' brief in the court of appeals (pp. iii–vi) lists the 61 creditors and their claims under the voluntary assignment.

the debts due the Navy, Army, and DSA in the amount of $52,313.95, not including interest. The district court held that the United States had absolute priority for its three claims under 31 U.S.C. 191 and 192 (App. C, *infra*).

The court of appeals reversed, one judge dissenting. Relying upon the technical requirements for a common law action of debt in the 1790's, the majority, Judge Jones held that the claims "were not for fixed and certain amounts and presently payable" at the time of the voluntary assignment and that Sections 191 and 192 therefore did not grant the United States priority (App. A, *infra*, 17). Judge Coleman concurred in a separate opinion (*id.* at 19).

In his dissent, Judge Thornberry noted cases granting priority to the United States for claims wholly unliquidated at the time of insolvency[4] and relied on the principle that Sections 191 and 192 are to be liberally construed to protect government funds[5] (*id.* at 20, 22–23). He also suggested that analogous definitions in the Bankruptcy Act for debts and unliquidated claims should apply in this context (11 U.S.C. 93(d), 103(a)(8), and 104(a)(5)), and concluded that the majority's narrow construction of "debts" defeats the purpose of protecting government revenues (*id.* at 22, 23–24) and that a debt" under Sections 191 and 192 includes an obligation unliquidated at the time of insolvency "so long as the claim can be liquidated or estimated * * * within a reasonable time so as to

[4] *King* v. *United States*, 379 U.S. 329; *United States* v. *Barnes*, 31 Fed. 705 (S.D.N.Y.).

[5] *E.g.*, *Small Business Administration* v. *McClellan*, 364 U.S. 446, 451–452; *United States* v. *State Bank*, 6 Pet. 29, 35.

avoid undue delay in distributing the debtor's assets to the creditors'" (*id.* at 24).

REASONS FOR GRANTING THE WRIT

1. In holding that the federal priority statute, requiring that "debts [of an insolvent] due to the United States shall be first satisfied" (31 U.S.C. 191), applies only to obligations for which a common law action of debt could have been maintained in 1797, the court of appeals has given the important priority statute an unduly technical construction in conflict with the decisions of this Court and other courts of appeals and contrary to long-standing practice.

The provisions of 31 U.S.C. 191, giving priority to "debts due to the United States," and of 31 U.S.C. 192, imposing personal liability for the unpaid portion of such debts on a person who pays other debts of an insolvent first, to the extent of such payments, have both been in effect in essentially their present language since the earliest days of the Republic. Section 191 derives from Section 3466 of the Revised Statutes, which was in turn based on a 1797 enactment providing in pertinent part "[t]hat where any * * * person hereafter becoming indebted to the United States * * * shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied * * *." 1 Stat. 515.[6] Section 192 derives from Section 3467 of the Revised Statutes, which was based on a 1799 enactment providing that any executor, administrator or other person who paid debts of a person or estate prior to paying "debts [due] to the United States from such person or estate" was personally liable to the extent of such other payments for the unpaid portions of "debts so due to the United States." 1 Stat. 676.

[6] The statute also applied where a debtor having insufficient property to pay all debts made a voluntary assignment for the benefit of creditors, and in other specified circumstances.

The purpose of these priority provisions, which are to be construed *in pari materia* (see, *e.g.*, *King* v. *United States*, 379 U.S. 329, 334–336), has been repeatedly stated by this Court; it is "to secure an adequate revenue to sustain the public burdens, and discharge the public debts." *United States* v. *State Bank*, 6 Pet. 29, 35; see, *e.g.*, *Price* v. *United States*, 269 U.S. 492, 500; *United States* v. *Emory*, 314 U.S. 423, 426; *Small Business Administration* v. *McClellan*, 364 U.S. 446, 452–453. Accordingly, the rule was early established by this Court that "there is no reason for giving to them a strict and narrow interpretation" (*United States* v. *State Bank, supra*, 6 Pet. at 35), and they are to be "liberally construed" in the government's favor. *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 134; *Bramwell* v. *United States Fid. & Guar. Co.*, 269 U.S. 483, 487; *Price* v. *United States, supra*, 269 U.S. at 500; *United States* v. *Emory, supra*, 314 U.S. at 426.

In particular, this "purpose is not to be defeated by unnecessarily restricting the application of the word 'debts' within a narrow or technical meaning." *Price* v. *United States, supra*, 269 U.S. at 500. Rather, "[a]ll debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language" of these pro-

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visions. *Beaston* v. *Farmers' Bank, supra,* 12 Pet. at 134. And, "[t]here exist now the same reasons for a liberal construction of the priority act as when the rule was laid down." *Bramwell* v. *United States Fid. & Guar. Co., supra,* 269 U.S. at 487; see *Viles* v. *Commissioner,* 233 F. 2d 376, 380 (C.A. 6).

The court of appeals, in giving the term "debt" a highly technical meaning limited to "liquidated" claims or other "claims * * * for sums certain or which could be made certain by mathematical computation" as of the date of insolvency (App. A, *infra,* 17), is in conflict with the foregoing well-established general principles. It also conflicts with decisions of this Court holding that an obligation may be a "debt due to the United States" even though, at the critical date of insolvency, it has not fully matured or is not yet fixed in amount. *E.g., United States* v. *Bryan,* 9 Cranch 374, 386; *United States* v. *State Bank, supra,* 6 Pet. at 36–39.[7] Indeed, nearly a century ago it had been established that the priority statute "extends to all classes of debts, whether liquidated or unliquidated, joint or several, legal or equitable * * *" (*United States* v. *Barnes,* 31 Fed. 705, 707 (C.C. S.D. N.Y.)), including claims of the United States that at

[7] The court of appeals' assumption that "debts" include only liabilities enforcible in a common law action for debt would also appear to be contrary to *United States* v. *Fisher,* 2 Cranch 358, where Chief Justice Marshall held the 1797 priority statute applicable to the endorser of a bill of exchange of which the United States was the holder, without regard to whether such a claim would have been cognizable in an action for debt, as opposed to assumpsit. Cf. *Phillips* v. *Runnels,* 43 Am. Dec. 109, 111 (Iowa); *Ross* v. *Milne,* 37 Am. Dec. 646, 653 (Va.); 1 R.C.L. 336–337 (1914).

the date of the insolvency were disputed and in litigation. *Ibid.*

In *United States* v. *State Bank, supra,* the Court indicated that the priority statutes, referring as they do to deceased debtors, could properly be construed by reference to the law concerning decedents' estates. 6 Pet. at 37. In that area as well, obligations have long been regarded as "debts due" from the decedent debtor even though the amount has not been ascertained at the time of death, nor the time for payment arrived (*e.g., Jones* v. *Cooper,* 2 Aikens 54, 56–57, 16 Am. Dec. 678, 681 (Vt.)), so that an action for debt would not have lain at the critical date. It is sufficient that a creditor's claim, even one for a breach of contact, may be subject of valuation (*ibid.*), even if a trial might be required. Cf. *In re Chestnut St. Trust & Saving Fund Company's Assigned Estate,* 217 Pa. 151, 155; 66 Atl., 332, 333.

In fact, in other cases this Court has sustained application of the priority statutes to "debts due"

[8] The dictum in *Massachusetts* v. *United States,* 333 U.S. 611, relied upon by Judge Coleman in his concurrence (App. A, *infra,* 19), is not to the contrary. There, in reconciling the provisions of the priority statute with certain specific provisions of the Internal Revenue laws and rejecting the government's claim of a "conditional priority," the Court observed in passing that "it is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of 'debts due' as of the time in insolvency." 333 U.S. at 626–627. However, where, as here, an insolvent had already repudiated, defaulted, or otherwise breached its contract prior to the insolvency, the liability to the United States is not "wholly contingent" upon post-insolvency events.

to the United States that were very similar to Emsco's obligations here. For example, both *United States* v. *National Sur. Co.*, 254 U.S. 73, and *King* v. *United States, supra,* involved debts based on defaults of government contractors, although the present point was apparently not in issue.

2. The decision of the court of appeals is important because it will have a significant adverse impact upon the efforts of the United States to protect its revenues. Under the bankruptcy laws, "debts" that may be proved include "contingent debts and contingent contractual liabilities" (11 U.S.C. 103(a)(8)), and "claims for anticipatory breach of contracts, executory in whole or in part * * *." 11 U.S.C. 103(a)(9). Moreover, such claims may be allowed if "capable of liquidation or of reasonable estimation * * * [without] unduly delay[ing] the administration of the estate * * *." 11 U.S.C. 93(d). In addition, the fifth priority in payment (before payment of other debts or claims of creditors) is given to "debts * * * owing to any person, including the United States, who by the laws of the United States is entitled to priority * * *." 11 U.S.C. 104 (a)(5).

Where bankruptcy proceedings have been commenced against a government contractor, it has been the long-standing practice of the United States to file preliminary or contingent claims, in cases like the present one, with the amount owing to be amended or established in accordance with the results of reprocurement, where appropriate, or disposition of a claim for breach of contract, either by negotiation or litigation. When the United States files such claims they

have routinely been allowed and accorded their priority. *E.g., King* v. *United States, supra.*[9]

Where bankruptcy proceedings have not been initiated[10] (*e.g.,* in cases involving general assignments for creditors, general receiverships, liquidations of insolvent corporations, insolvent decedents' estate), the United States may rely instead upon the priority established by Section 191. *United States* v. *Emory, supra,* 314 U.S. at 427–429. In such cases the claims of the United States have likewise heretofore been respected and accorded priority, though they be uncertain in amount at the time of insolvency.

In either case, the principal advantages conferred upon the United States by the priority statutes are not only the right to payment before other creditors, but also the right to have its interests protected by the assignee, trustee, executor, or other person in charge of the insolvent's estate. The court of appeals' constriction of the scope of the priority statute would therefore mean that a significant portion of the government's claims against contractors which, due to the priority, have heretofore been fully or substantially satisfied, would be paid only to the extent of the ratable share of the estate remaining, if any, for distribution

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[9] Sometimes the claim is not filed until after the precise amount due has been ascertained. *E.g., United States* v. *Barnes, supra;* cf. 11 U.S.C. 93(f).

[10] The United States cannot always insist that bankruptcy proceedings be instituted, because, if twelve or more creditors have claims, an involuntary bankruptcy petition may be filed only by three or more creditors having provable liquidated claims, not contingent as to liability, amounting in the aggregate to $500 in excess of the value of any securities held by them. 11 U.S.C. 95(b).

among nonpriority priority creditors.[11] In addition, the United States would be obliged to participate more actively in the proceedings to protect its interest, thereby incurring additional administrative burdens and expenses.

Under the court of appeals' decision, the determination as to whether the government may rely upon the priority statutes to protect its interests would seem to depend upon a judgment whether the obligation in issue would have been a proper subject of a common law action for debt in 1797. Delineation of the arcane distinctions between debt, assumpsit, and other common law forms of action (cf. Holmes, *The Common Law* 251–271, 275–288 (1881)) may be an appropriate task for scholars, but it is plainly an unworkable test for practicable application by government officers, executors, bankruptcy trustees, or others affected by the priority statutes.

Even if the decision below were inapplicable to claims of the United States presented in bankruptcy proceedings,[12] its consequences would be undesirable,

[11] With respect only to the specific type of contract claim involved in this case—nonperformance requiring reprocurement—the Department of Defense alone estimates that claims totalling several million dollars arise annually. While insolvency is not always the cause for such defaults, it is frequently a problem. The government's other breach of contract claims against companies that become insolvent would also be affected by the decision below.

[12] The present case does not involve a bankruptcy proceeding and the court did not address the consequences of its decision for the government's right to priority under the bankruptcy laws (11 U.S.C. 104(a)(5)), which is in turn dependent upon its right to priority under federal law. Whether the explicitly broader language of the bankruptcy laws (see p. 10, *supra*) would call for a different result in such a case is an open question.

for then insolvents might be induced to make a voluntary assignment for the benefit of creditors, before bankruptcy proceedings were begun, so as to aid its other creditors by reducing or eliminating the priority claims of the United States. This Court warned long ago that such assignments could be abused and held that the priority statutes should be construed to avoid that risk, especially where the construction protecting the government's interests is based on long-standing practice. *United States* v. *State Bank, supra,* 6 Pet. at 38–40.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1974.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 73–2951

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, ET AL., DEFENDANTS-APPELLANTS

July 26, 1974

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, THORNBERRY and COLEMAN, *Circuit Judges.*

JONES, *Circuit Judge.*

The facts from which this controversy arose were stipulated. In June, 1966, Emsco Screen Pipe Company of Texas entered into separate contracts with the Department of the Navy, the Department of the Army and the Defense Supply Agency for materials and supplies to be furnished thereafter. Emsco defaulted. The Navy terminated its contract on August 31, 1966. The Army terminated on December 6, 1966, and Defense Supply on October 19, 1966. Emsco made a voluntary assignment for the benefit of its creditors on October 20, 1966, to Thomas W. Moore, Jr. It was stipulated that "All of the * * * claims

were finalized [1] as to exact amounts after the aforesaid assignment." The assets in the hands of the assignee were insufficient to discharge all claims in full. The United States brought an action against the assignee and asserted priority under 31 U.S.C.A. § 191.[2] The district court concluded that the statute gave priority and entered judgment for the United States. The assignee has appealed.

[1, 2] The question to be decided is whether there were "debts due to the United States" from Emsco at the time it made its assignment for the benefit of creditors. The statute providing priority and the phrase "debts due" are not new. The present statute is not very different from the version incorporated in the revised statute.[3] The phrase is, it seems, included

[1] "finalize to put into final form; to complete,

"Usage: Finalize is closely associated with the language of bureaucracy in the minds of many careful writers and speakers and is consequently avoided by them." American Heritage Dictionary, 1969, p. 492. As used in the stipulation the word means determined and agreed upon.

[2] "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." 31 U.S.C.A. § 191.

[3] "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." R.S. § 3466.

in an Act of Congress of 1797. See *Prince* v. *Bartlett*, 12 U.S. (8 Cranch) 431, 3 L.Ed. 614. The word "debt" has been many times defined and given many varied meanings. The definitions range from the duty to return a social courtesy to legal obligations of many kinds. 26 C.J.S., p. 1, Debt, et seq. It has been said that a debt is an obligation to render something to someone else. In searching for the meaning of a term of so many different meanings in different contexts, we look to the meaning which it had when it was used in the first priority statute enacted by the Congress. At that time the basic law of all of the states, both substantive and procedural, was the common law. One of the common law actions was the action of debts. "The action of debt lies where a party claims the recovery of a debt, i.e. a liquidated or certain sum of money alleged to be due to him." Stephen, Principles of Pleading, 8th Am. Ed., p. 13, 1859. Such was the meaning of the word "debt" at the time of the earliest priority enactment. Such is the meaning of the word in the present statute. The United States had claims for damages for breach of contract. The stipulation expressly states that the claims were not finalized when the assignment was made. The claims were not for sums certain or which could be made certain by mathematical computation. They were not liquidated. Because the claims of the United States were not for fixed and certain amounts and presently payable, they were not debts due.

Since it is here determined that the claims of the United States were not "debts due," the judgment of

the district court will be reversed and the cause remanded for further appropriate proceedings.

Reversed and remanded.

COLEMAN, *Circuit Judge,* Separate Opinion.

Judges Jones and Thornberry reach diametrically opposing results as to how the issue raised in this appeal should be decided. Their written opinions reflect the precedential murkiness surrounding the question. Neither cites a case squarely in point. Thus, they are left to reason from other premises. Obviously, I find myself similarly situated.

I am impressed by the fact that this statute has been on the books since March 3, 1797, and all along the language has remained the "same" or "equivalent", *United States* v. *Oklahoma,* 261 U.S. 253, 43 S.Ct. 295, 67 L.Ed. 638. Thus, it would appear, Congress has considered it adequate to the consummation of its fundamental purpose, which the courts have described as the "protection of the government's revenue". It has been content to rely on debts; it has not seen fit to expand the language to include "claims" or such like.

I note, too, that this statute is codified in the official version of the United States Code, United States Government Printing Office, 1971, Chapter 6 of Title 31, under the heading, "Debts Due By, or To, The United States".

Stripped of language inapplicable to the issue which must be decided, 31 U.S.C. § 191 may be read as follows:

> Whenever any person indebted to the United States is insolvent * * * *, the debts due to the United States shall be first satisfied. (emphasis added).

In other words, there must not only be a "debt", but it must be "due".

Let us now look at the case.

In its brief the Government says, "The original claims were against the assignee and Emsco for breach of contract" (emphasis mine). When did the "claim" ripen into a "debt due"? My answer to this has to be, "not until the amount of the damages for the breach had been ascertained by someone with the appropriate jurisdiction to make a determination binding on both the claimant and the defendant".

The contract which ultimately gave rise to this "debt" (or claim, as the case may be) was made in June, 1966. The contract was an obligation, according to its own terms, but I doubt that either in 1797 or today it could be "liberally construed" to be a debt. The default spawned a claim for breach of the contract, but, again, I cannot construe a claim to be a debt, although it most certainly may ripen into one, as it did here. A claim cannot be a "debt due" until the amount has been ascertained. The assignment for the benefit of creditors was made on October 20, 1966. I have no hesitancy in saying that on that date the United States was not the owner of a debt due from Emsco. It had only a claim. To this point, therefore, I am in agreement with the views expressed by Judge Jones.

I read *Massachusetts* v. *United States,* mentioned in Judge Thornberry's opinion, to mean that priority is to be determined as of the date of the insolvency, not retroactively. The amount owed by Emsco as damages for its default was not finally ascertained until 1973, about seven years after the insolvency.

I, therefore, concur in the reversal of the judgment below and remand for further proceedings.

THORNBERRY, *Circuit Judge* (dissenting):

In this case we are called upon to construe the meaning of "debts due to the United States" as used in 31 U.S.C.A. § 191 (hereinafter the "Priority Stat-

ute"). In selecting among the various definitions of "debt" that have been applied in varying contexts, the majority inexplicably turns to the highly technical definition of the common law action of debt. In so doing the majority fails to construe the statute, in accordance with guidance from the Supreme Court, breaks with prior judicial interpretation without discussing the relevant cases, and creates an unexplained and unwise deviation from the interpretation of the term under the Bankruptcy Act, despite the analogous factual bases for application of the two statutes. Therefore, with deference, I dissent.

The Priority Statute is founded on the public policy of securing an adequate revenue to sustain public burdens and discharge the public debts. *United States* v. *State Bank of North Carolina,* 1832, 6 Pet. (31 U.S.) 29, 8 L.Ed. 308; *Small Business Administration* v. *McClellan,* 1960, 364 U.S. 446, 81 S.Ct. 191, 5 L.Ed. 2d 200; *City of Sherman* v. *United States,* 5 Cir. 1968, 400 F. 2d 373; *Viles* v. *Commissioner of Internal Revenue,* 6 Cir. 1956, 233 F. 2d 376. The statute is to be liberally construed in order to effectuate that purpose. *United States* v. *State Bank of North Carolina, supra; Bramwell* v. *United States Fidelity & Guaranty Co.,* 1926, 269 U.S. 483, 46 S.Ct. 176, 70 L.Ed. 368; *United States* v. *Emory,* 1941, 314 U.S. 423, 62 S.Ct. 317, 86 L.Ed. 315; *United States* v. *Gotwals,* 10 Cir. 1946, 156 F. 2d 692; *Lakeshore Apartments, Inc.* v. *United States,* 9 Cir. 1965, 351 F. 2d 349. By adopting a narrow, technical definition of "debt" so as to defeat the United States' priority, the majority, it seems to me, flies in the teeth of these well established general principles of construction.

The few cases that have directly considered whether the Priority Statute applies to unliquidated obligations also point toward an affirmative answer. The

strongest case support for the majority's position is *Massachusetts* v. *United States,* 1948, 333 U.S. 611, 68 S.Ct. 747, 92 L.Ed. 968, where the Court held that the option of an assignee for the benefit of creditors to pay state unemployment compensation taxes and take credit against federal taxes was cut off by the insolvency of the debtor. In rationalizing this result, the Court appeared to adopt a narrow definition of "debt" for purposes of the Priority Statute.

> [I]t is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of "debts due" as of the time of insolvency.

333 U.S. at 626–627, 68 S.Ct. at 756. In footnote 26, the Court explained further.

> [The fact that] all of the decisions sustaining the priority were for debts clearly due and owing, adds force to the clear inferences implicit in the statute's wording, viz., that Congress not only created a conclusive priority attaching as of the time of insolvency but in doing so drew the line for its operation close to, if not at, the commonly accepted meaning of "debt" as distinguished from other forms of obligation.

68 S.Ct. at 756–757. The *Massachusetts* case does not directly support the majority's result in this case, however, since there the Court's primary concern was the contingency of the very fact of liability. In our case, all the events necessary to fix liability for the excess cost of reprocurement had occurred prior to insolvency, as the majority opinion makes clear. This liability was not contingent in any sense; it was merely unliquidated in amount. Therefore it was not the sort of obligation excluded from the coverage of the Priority Statute in *Massachusetts.*

Two cases have given priority to government claims that were wholly unliquidated at the time of insolvency. In *King* v. *United States,* 1964, 379 U.S. 329, 85 S. Ct. 427, 13 L.Ed.2d 315, the Seeley Tube & Box Company filed a petition for reorganization under Chapter XI of the Bankruptcy Act. Soon thereafter the United States notified Seeley that it intended to terminate two contracts between Seeley and the Picatinny Arsenal due to Seeley's default. King, Seeley's president, was appointed as distributing agent. He distributed the bulk of the assets with court approval before the United States liquidated its claim by reletting the contracts at a higher cost. As a consequence, there were insufficient funds remaining to pay all of the Government's claim. Under these circumstances the Court held King's estate liable for the unpaid portion because the Government's claim, though unliquidated at the time of insolvency, had been entitled to its statutory priority. The implicit holding that an unliquidated claim may be a "debt" within the Priority Statute so long as it is capable of liquidation is not directly controlling here, despite the identity of factual settings, since it was not a disputed issue in the case, King having admitted the Government's priority in oral argument. *See United States* v. *L.A. Tucker Truck Lines, Inc.,* 1952, 344 U.S. 33, 73 S.Ct. 67, 97 L.Ed. 54; *United States* v. *Mitchell,* 1926, 271 U.S. 9, 46 S.Ct. 418, 70 L.Ed. 799; *Webster* v. *Fall,* 1925, 266 U.S. 507, 45 S.Ct. 148, 69 L.Ed. 411. Nevertheless the *King* case provides some support for the proposition that an unliquidated claim may be a "debt" within the Priority Statute, as the district court in our case noted.

Finally, in *United States* v. *Barnes,* C.C., S.D.N.Y. 1887, 31 F. 705, the court held that a claim of the United States had been entitled to its priority despite

the fact that the amount of the claim was the subject of pending litigation both at the time of adjudication of bankruptcy and of distribution of the debtor's assets. The court said plainly that unliquidated claims of the Government are entitled to priority.

> It is established by many adjudications, in which the meaning and effect of these provisions have been discussed, that such priority extends to all classes of debts, whether liquidated or unliquidated, joint or several, legal or equitable * * *.

Id. at 707. The antiquity of the case, coupled with its explicit reliance on prior adjudications, undercuts the majority's assertion that its narrow definition was "the meaning of the word 'debt' at the time of the earliest priority enactment." On the contrary, a broad and liberal interpretation of the term was the rule from the first, a rule from which the majority departs today.

The Bankruptcy Act's analogy also points strongly toward allowance of priority for claims that are unliquidated as of the time of insolvency. In relevant part, the Act provides that

> The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (5) debts owing to any person, including the United States, who by the laws of the United States i[s] entitled to priority * * *

11 U.S.C.A. § 104(a). The Act also provides that

> Debts of the bankrupt may be proved and allowed against his estate which are founded upon * * * (8) contingent debts and contingent contractual liabilities * * *.

11 U.S.C.A. § 103(a). Unliquidated claims are also provable and allowable, so long as the amount of the claim can be fully liquidated or estimated within the time set by the court. 11 U.S.C.A. § 93(d); 1 Collier Bankruptcy Manual, ¶ 57.11 (2d ed. 1973).

Both the Bankruptcy Act and the Priority Statute apply to disposition of assets that are insufficient to meet all of the debtor's liabilities. The issue under both statutes is whether obligations to the United States will be first satisfied in full or only satisfied in the same proportion as other obligations. The public policy of securing an adequate revenue so as to sustain public burdens and discharge public debts applies equally under both statutes. The Government is entitled to fifth priority in Bankruptcy Act proceedings for debts unliquidated at the time of insolvency solely by virtue of the existence of the Priority Statute, which is the only law of the United States giving priority to debts owing to the United States within the meaning of 11 U.S.C.A. § 104(a). 1A Collier Bankruptcy Manual, ¶ 64.501 (2d ed. 1973). It seems to me that Congress has clearly shown what it means when it uses the term "debts" in this factual context in § 63 of the Bankruptcy Act, 11 U.S.C.A. § 103, and that definition clearly includes the sort of unliquidated obligation involved in this suit, so long as the claim can be liquidated or estimated, as it was in this case, within a reasonable time so as to avoid undue delay in distributing the debtor's assets to the creditors. I think we should apply this entirely sensible reading of the term absent some good reason to deviate, and no good reason, in my opinion, has been offered.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1973

No. 73-2951

D.C. Docket No. 72-H-164

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Southern District of Texas

Before JONES, THORNBERRY and COLEMAN, CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District

Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

JULY 26, 1974.

COLEMAN, *Circuit Judge,* specially concurring.

THORNBERRY, *Circuit Judge,* dissenting.

Issued as Mandate: August 9, 1974.

APPENDIX C

In the United States District Court for the Southern District of Texas, Houston Division

Civil Action No. 72-H-164

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., EMSCO SCREEN PIPE COMPANY, INC., DEFENDANTS

FINAL JUDGMENT

Came on for trial by the Court on the 29th day of May, 1973 the above-entitled action, and the parties having stipulated to the facts and having presented oral arguments, and the Court having fully considered the above, as well as the briefs submitted by the parties, and the Court having found that the plaintiff, the United States of America, is entitled to absolute priority with regard to the distribution of the assets of Emsco Screen Pipe Company, Inc. up to full amount of its claims which to date total SIXTY-SEVEN THOUSAND THREE HUNDRED THIRTEEN and 70/100 DOLLARS ($67,313.70) including interest on the Navy claim to June 1, 1973, it is hereby

I.

ORDERED, ADJUDGED and DECREED that the United States of America have and recover of the defendant, Emsco Screen Pipe Company of Texas, Inc. and defendant, Thomas W. Moore, Jr., assignee for the benefit of creditors of Emsco, jointly and severally, the sum of FIFTY-FIVE THOUSAND SEVEN HUNDRED SEVEN and 28/100 DOLLARS ($55,707.28). The right to recovery of the above sum is without prejudice to the further right of the United States, upon final distribution by the assignee, to the funds representing the interest on the aforementioned principal amount to the extent that such funds are not applied by the defendant, Thomas W. Moore, Jr., for the purposes of administering the Emsco estate under assignment, and for pursuing the defense of this action in higher courts.

II.

It is further ORDERED, ADJUDGED and DECREED that the United States of America have and recover of Emsco Screen Pipe Company of Texas, Inc. the additional sum of ELEVEN THOUSAND SIX HUNDRED SIX and 42/100 DOLLARS ($11,606.42) plus interest at the rate of six percent (6%) per annum from the date of judgment until paid. Any amounts paid upon distribution by Thomas W. Moore, Jr. to the United States of America over and above FIFTY-FIVE THOUSAND SEVEN HUNDRED SEVEN and 28/100 ($55,707.28) shall be subtracted from the amount of the judgment against Emsco contained in this paragraph.

III.

It is also ORDERED, ADJUDGED and DECREED that interest at the rate of six percent (6%) per annum from the date of this judgment until paid shall, as pertains to paragraph I of this judgment, be assessed only as to Emsco Screen Pipe Company and not as to Thomas W. Moore, Jr.

IV.

It further appearing to the Court that the claims made the basis of this action comprise: 1) a claim by the Navy in the amount of FORTY THOUSAND SIX HUNDRED SEVEN and 13/100, plus interest of FIFTEEN THOUSAND SIX HUNDRED THIRTY-THREE and 75/100 DOLLARS ($15,633.75) to June 1, 1973; 2) a claim by the Army for FIVE THOUSAND DOLLARS ($5,000.00); and 3) a claim by the Defense Supply Agency for SIX THOUSAND SEVENTY-TWO and 82/100 DOLLARS ($6,072.82); it is hereby

ORDERED, ADJUDGED and DECREED that the Army, Navy and Defense Supply Agency shall share the proceeds of this judgment on a pro rata basis based on the amount of the claim of each, as set out above, on the date of this judgment.

V.

Pursuant to the Stipulation filed herein by the parties, it is

ORDERED, ADJUDGED and DECREED that no execution or levy shall issue on this judgment until all avenues of appeal have been exhausted or until a stipulation by the parties is filed herein stating that no further appeal will be taken. Defendants shall not be required to file a supersedeas bond.

DONE at Houston, Texas this 30th day of May, 1973.

PETER T. FAY,
United States District Judge.

Approved as to form:
ANTHONY J. P. FARRIS,
United States Attorney
HELEN M. EVERSBERG,
Assistant United States Attorney.
THOMAS OSA HARRIS,
By HELEN M. EVERSBERG,
Attorney for Defendants.

U.S. GOVERNMENT PRINTING OFFICE: 1974

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-687

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN AND PIPE COMPANY, AND EMSCO SCREEN AND PIPE COMPANY OF TEXAS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 8, 1974
CERTIORARI GRANTED FEBRUARY 18, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-687

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN AND PIPE COMPANY, AND EMSCO SCREEN AND PIPE COMPANY OF TEXAS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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[1] (The Opinion and the Judgment of the court of appeals and the Judgment of the district court are printed as appendices to the petition for a writ of certiorari filed in this case and will not be reprinted in this Appendix.)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2/ 8/72	Complaint. filed. (1) summons issued.
2/17/72	Summons Ret. & filed. Ex. 2/14/72.
3/ 1/72	Defts.' ANSWER. filed.
4/14/72	Plf.'s Motion for leave to file amended complaint. filed. (no objection)
4/17/72	Amended Complaint. filed.
5/29/73	(P.T.Fay) Pre-Trial Order, filed.
5/29/73	Stipulations, filed.
5/29/73	Trial Brief for the Plaintiff, filed.
5/29/73	Trial Brief for the Defendants, filed.
5/29/73	Proposed Conclusions of Law, filed.
5/20/73	(P.T.Fay) Final Judgment, filed and entered.
7/23/73	Deft's Notice of Appeal, filed (Copy mailed to Plff)
7/23/73	Cost Bond on Appeal, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed Feb. 8, 1972, Clerk, U.S. District Court, Southern District of Texas. V. Bailey Thomas, Clerk. By Deputy E. Knoblauch]

Civil Action No. 72-H-164

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS W. MOORE, ESQUIRE, ASSIGNEE FOR THE BENEFIT OF CREDITORS FOR THE EMSCO SCREEN PIPE COMPANY OF TEXAS, INC.; EMSCO SCREEN PIPE CO. OF TEXAS, INC., DEFENDANTS

COMES NOW the United States of America, Plaintiff herein, and sues Thomas W. Moore, Jr., Esquire, assignee for the benefit of creditors for the Emsco Screen Pipe Company of Texas, Inc., and also sues Emsco Screen Pipe Company of Texas, Inc., a corporation; and alleges:

COUNT I

1. That this is an action brought by the United States of America for and on behalf of the Department of the Navy, an agency and instrumentality of the United States; and jurisdiction is founded in Title 28 U.S.C. § 1345;

2. That the Defendant, Thomas W. Moore, Jr., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

3. That the Defendant, Emsco Screen and Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas is within the jurisdiction of this Court;

4. That, under the terms of the contract NOO197-66-C-0432, dated June 9, 1966, the Defendant Emsco agreed to furnish the Department of the Navy shield assemblies and fabricated items at a total contract price of $210,-231.18 with deliveries to commence in October, 1966, and final delivery to be completed by June, 1967;

5. That notwithstanding the above terms, the Defendant Emsco made no delivery of said material to the Navy as required by the contract; thereby breaching said contract;

6. That, as a consequence of the Defendant Emsco's failure and refusal to comply with and abide by the terms of the agreement, the contract was terminated on August 31, 1966;

7. That, as a result of the termination for default, the Plaintiff reprocured the said contract on November 23, 1966, wherein Emsco became indebted to the Plaintiff in the sum of $40,607.13 representing excess costs of repurchase of said materials, plus 6% interest per annum from December 1, 1966;

8. That on October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditors obligations, made a voluntary assignment for the benefit of creditors to the Defendant, Thomas W. Moore, Jr., and that Defendant Moore is presently the voluntary assignee for the benefit of creditors;

9. That the administrative appeal on this contract (ASBCA 11917 and 12184) has been dismissed with prejudice to the Defendant Emsco;

10. That the Defendants Moore and Emsco have sufficient funds to pay the sum alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. §§ 191 and 192.

11. That, although requested to do so, the Defendants Emsco and Moore have failed and refused to pay the sum alleged hereinabove, or any part thereof, for which they are justly indebted;

WHEREFORE, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $40,607.13 with interest thereon at the rate of

6% per annum from December 1, 1966, until paid; and, for such other relief to which Plaintiff may be entitled including costs;

2. Judgment against Defendant, Thomas W. Moore, Esquire, assignee for the benefit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession sufficient to satisfy Plaintiff's claim in the sum of $40,607.13 with interest thereon at the rate of 6% per annum from December 1, 1966, until paid; and, for such other relief to which Plaintiff may be entitled, including costs;

COUNT II

12. That this action brought by the United States of America for and on behalf of the Defense General Supply Agency, an agency and instrumentality of the United States; and jurisdiction is founded on Title 28, U.S.C. § 1345.

13. That the Defendant, Thomas W. Moore, Jr., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

14. That the Defendant Emsco Screen Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas is within the jurisdiction of this Court;

15. That, under the terms of the contract, No. DSA-400-66-C-0751/TM540 dated June 14, 1966, the Defendant Emsco agreed to furnish the Defense General Supply Center, 390 BN, FSN 3990-223-6529 at $92.87 each and 483 BN, FSN 3990-291-8717 at $75.40 each, pallet, material handling on or before August 25, 1966 for a total price of $72,637.50;

16. That notwithstanding the above terms, the Defendant Emsco made no delivery of said materials to the Plaintiff as required by the contract, thereby breaching said contract;

17. That, as a consequence of the Defendant's Emsco's failure and refusal to comply with and abide by the

terms of the agreement, the contract was terminated on October 19, 1966;

18. That, as a result of the termination for default, the Defendant became indebted to the Plaintiff in the amount of $8,436.06 representing excess costs of repurchase of said materials;

19. That on October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant, Thomas W. Moore, Jr.;

20. That on August 19, 1968 Defendant Moore and Plaintiff executed a settlement agreement in the amount of $6,072.82 a true copy of which is attached herein and marked Plaintiff's Exhibit "A".

21. That pursuant to said settlement agreement, the named parties therein mutually agreed that the liability owed to the Plaintiff under the aforesaid contract is $6,706.82;

22. That the administrative appeal on this contract (ASBCA 12284) has been dismissed with prejudice to the Defendant Emsco;

23. That the Defendants Moore and Emsco have sufficient funds to pay the sum agreed to under the terms of the said settlement agreement alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. § 191 and 192.

24. That although requested to do so, the Defendants Moore and Emsco have failed and refused to pay the agreed settlement amount alleged hereinabove, or any part thereof for which they are justly indebted;

WHEREFORE, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $6,706.82; and, for such other relief to which Plaintiff may be entitled, including costs;

2. Judgment against Defendant, Thomas W. Moore, Esquire, assignee for the benefit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession suffi-

cient to satisfy Plaintiff's claim in the sum of $6,706.82; and, for such other relief to which Plaintiff may be entitled, including costs;

COUNT III

25. That this is an action brought by the United States of America for and on behalf of the Department of the Army, an agency and instrumentality of the United States; and jurisdiction is founded on Title 28, U.S.C. § 1345;

26. That the Defendant, Thomas W. Moore, Jr., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

27. That the Defendant Emsco Screen and Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas is within the jurisdiction of this Court;

28. That, under the terms of the contract, No. DA23-195-AMC-01073(T) dated June 8, 1966, the Defendant Emsco agreed to furnish the Department of the Army 400 each of FSN 5420-542-4722 Curb Deck assembly on or before December 5, 1966, for a total price of $27,-428.00;

29. That notwithstanding the above terms, the Defendant Emsco made no delivery of said materials to the Plaintiff as required by the contract, thereby, breaching said contract, insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant Thomas W. Moore, Jr.;

31. That, in making the said assignment, the Defendant Emsco anticipatorily breached the aforesaid contract;

32. That, as a consequence of the Defendant Emsco's failure and refusal to comply with and abide by the terms of the agreement, the contract was terminated on December 6, 1966;

33. That, as a result of the termination for default, the Defendant Emsco became indebted to the Plaintiff in the amount of $4,272.00;

34. That the claim for $4,272.00 by the Plaintiff was amended several times and that the said Defendants, Moore and Emsco agreed upon a settlement with the Plaintiff in the amount of $5,000.00, a true copy of which is attached herein and marked Plaintiff's Exhibit "B";

35. That pursuant to said settlement agreement, the named parties therein mutually agreed that the liability owed to the Plaintiff under the aforesaid contract is $5,000.00;

36. That the administrative appeal on this contract (ASBCA 12179) has been dismissed with prejudice to the Defendant Emsco;

37. That the Defendants Moore and Emsco have sufficient funds to pay the sum agreed to under the terms of the said settlement agreement alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. §§ 191 and 192;

38. That although requested to do so, the Defendants Moore and Emsco have failed and refused to pay the agreed settlement amount alleged hereinabove, or any part thereof, for which they are justly indebted;

WHEREFORE, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $5,000.00; and for such other relief to which Plaintiff may be entitled, including costs;

2. Judgment against Defendant, Thomas W. Moore, Esquire, assignee for the benefit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession sufficient to satisfy Plaintiff's claim in the sum of

$5,000.00; and, for such other relief to which Plaintiff may be entitled, including costs.

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ Helen M. Eversberg
HELEN M. EVERSBERG
Assistant United States Attorney

Of Counsel:

ROGER C. WESLEY
Trial Attorney
Department of Justice, Civil Division
Washington, D.C. 20530

FSN 3000-223-6529

STANDARD FORM 30, JULY 1966
GENERAL SERVICES ADMINISTRATION
FED. PROC. REG. (41 CFR) 1-16.101

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

PAGE 1 OF 3

1. AMENDMENT/MODIFICATION NO.	2. EFFECTIVE DATE	3. REQUISITION/PURCHASE REQUEST NO.	4. PROJECT NO. (If applicable)
P-004			

5. ISSUED BY CODE

Directorate of Procurement & Production
ATTN: MA343
Defense General Supply Center
Richmond, Virginia 23219

6. ADMINISTERED BY (If other than block 5) CODE

Chief, DCASO
2320 LaBranch Street
Houston, Texas 77004

7. CONTRACTOR NAME AND ADDRESS (Street, city, county, state, and ZIP Code) CODE FACILITY CODE

Emsco Screen Pipe Company
of Texas, Inc.
3 Rick Road
Houston, Texas 77021

8.
☐ AMENDMENT OF SOLICITATION NO. _____,
DATED _____ (See block 9)
☒ MODIFICATION OF CONTRACT/ORDER NO. DSA-400-66-C-0751
DATED 14 June 66 (See block 11)

9. THIS BLOCK APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in block 12. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offerors must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation, or as amended, by one of the following methods: (a) By signing and returning _____ copies of this amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If, by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided such telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

10. ACCOUNTING AND APPROPRIATION DATA (If required)

11. THIS BLOCK APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

(a) ☐ This Change Order is issued pursuant to _____
The Changes set forth in block 12 are made to the above numbered contract/order.

(b) ☐ The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in block 12.

(c) ☒ This Supplemental Agreement is entered into pursuant to authority of 10 USC 2304 (a)
It modifies the above numbered contract as set forth in block 12.

12. DESCRIPTION OF AMENDMENT/MODIFICATION

See pages 2 and 3 of this modification.

JCS

Except as provided herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect.

13. ☐ CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT ☒ CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 3 COPIES TO ISSUING OFFICE

14. NAME OF CONTRACTOR/OFFEROR		17. UNITED STATES OF AMERICA	
BY EMSCO SCREEN PIPE COMPANY OF TEX. INC (Signature of person authorized to sign)		BY _____ (Signature of Contracting Officer)	
15. NAME AND TITLE OF SIGNER (Type or print)	**16. DATE SIGNED**	**18. NAME OF CONTRACTING OFFICER** (Type or print)	**19. DATE SIGNED**
THOMAS W. MOORE, Jr Assignee for benefit of Creditors of	8/19/68	J. S. HARVIE	

EMSCO Screen Pipe Company of Texas, Inc., but not individually

BEST COPY AVAILABLE

9

K

SETTLEMENT AGREEMENT

Modification No. P-004
Date: _____
Contract No. DSA-400-66-C-0751/MA343
Rqn. Nos. AT4005 3288 9516-XX, AT6508 5189 3552-XX & AX3836 6030 1499-XX
FSN 3990-223-6529
Allotment Funds: 97X4961.5104 01 0026 S44-073

Emsco Screen Pipe Company of Texas, Inc.
3 Rick Road
Houston, Texas 77021

THIS SETTLEMENT AGREEMENT between the United States of America (hereinafter called "the Government") represented by the Contracting Officer executing this Agreement, and Emsco Screen Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas (hereinafter called "Contractor") represented by Thomas W. Moore, Jr., Esq.. Assignee for the Benefit of Creditors (hereinafter called Assignee),

WITNESSETH THAT:

WHEREAS the Government awarded Contract No. DSA-400-66-C-0751/TM540 to Contractor on 14 June 1966 in the total amount of $72,637.50 and terminated the contract for default in its entirety on 19 October 1966; and

WHEREAS Contractor appealed the termination for default to the Armed Services Board of Contract Appeals, ASBCA No. 12284; and

WHEREAS the Government made demand for the payment of excess costs of repurchase in the total amount of $8,436.06, with interest from 05 January 1967; and

WHEREAS an offer to compromise the Government's claim against Contractor was submitted in the amount of $6,706.82 by telegram of Attorney/Assignee dated 12 January 1968 and accepted by the Government's telegram dated 12 January 1968.

NOW, THEREFORE, the parties hereto do mutually agree as follows:

1. That the liability of the Contractor to the Government under the aforesaid contract is $6,706.82.

4. That upon execution of this Agreement by the parties hereto, either party may request the Board's consent to withdrawal of the appeal, with prejudice, from its docket.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

Date: 68 Aug. 23

UNITED STATES OF AMERICA

BY /s/ J. L. Harris
Contracting Officer
EMSCO SCREEN PIPE COMPANY OF TEXAS, INC.

Date: 8/19/68

BY /s/ Thomas W. Moore
THOMAS W. MOORE
Assignee for the
Benefit of Creditors,
but not individually

Mrs. Compton/rt/NI 3-3311/5 AMSTR-PDO-C 66-290-C

STANDARD FORM 30, JULY 1966
GENERAL SERVICES ADMINISTRATION
FED. PROC. REG. (41 CFR) 1-16.101

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

PAGE 1 OF 2

1. AMENDMENT/MODIFICATION NO.	2. EFFECTIVE DATE	3. REQUISITION/PURCHASE REQUEST NO.	4. PROJECT NO. (If applicable)
P0001	1 Apr 68	[illegible]	

5. ISSUED BY [illegible]-PDO-C CODE
U. S. Army Mobility Equipment Command
Directorate of Procurement & Production
4300 Goodfellow Boulevard
St. Louis, Missouri 63120

6. ADMINISTERED BY (If other than block 5) CODE
Defense Contract Administration Services Office,
Houston
P. O. Box 61167
Houston, Texas 77061

7. CONTRACTOR NAME AND ADDRESS (Street, city, county, state, and ZIP Code) CODE FACILITY CODE

Thomas W. Moore
Assignee for Benefit of Creditors
Emsco Screen Pipe Co. of Texas, Inc.
Houston, Texas 77021

8.
☐ AMENDMENT OF SOLICITATION NO. _____
DATED _____ (See block 9)
☒ MODIFICATION OF DA CONTRACT/ORDER NO. DA-23-195-AMC-01073(T)
DATED 8 June 1966 (See block 11)

9. THIS BLOCK APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in block 12. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offerors must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation, or as amended, by one of the following methods: (a) By signing and returning _____ copies of this amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If, by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided such telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

10. ACCOUNTING AND APPROPRIATION DATA (If required)
21X2030 66D-5070 PH730-31 S23-195 Supplies
21X2030 66D-5070 PH730-22 S23-195 Transportation

11. THIS BLOCK APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

(a) ☐ This Change Order is issued pursuant to _____
The Changes set forth in block 12 are made to the above numbered contract/order.

(b) ☐ The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in block 12.

(c) ☒ This Supplemental Agreement is entered into pursuant to authority of 10 U.S.C. 2304(a)(1)
It modifies the above numbered contract as set forth in block 12.

12. DESCRIPTION OF AMENDMENT/MODIFICATION

WHEREAS Supply Contract No. DA-23-195-AMC-01073 was awarded to Emsco Screen Pipe Company of Texas, Inc., hereinafter referred to as EMSCO, by the United States of America, hereinafter referred to as the Government, on 8 June 1966;

WHEREAS a general Assignment for the Benefit of Creditors was made by EMSCO on 20 October 1966, to Thomas W. Moore, Jr. as Assignee for Benefit of Creditors;

WHEREAS the aforesaid contract was terminated by the Government for default on 6 December 1966;

WHEREAS the Government contends a repurchase and reprocurement was effected on 9 June 1967, which resulted in $5,952.00 excess costs;

WHEREAS a demand was made by the Government on 21 July 1967, for payment of the aforesaid sum;

WHEREAS the Assignee for Benefit of Creditors contends that EMSCO does not owe the Government for excess costs under the aforesaid contract and that such contract should have been terminated for the convenience of the Government;

Except as provided herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect.

13.
☐ CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT
☒ CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 6 COPIES TO ISSUING OFFICE

14. NAME OF CONTRACTOR/OFFEROR	17. UNITED STATES OF AMERICA
BY Assignee for Benefit of Creditors of Emsco Screen Pipe Co. of Texas, Inc. (Signature of person authorized to sign)	BY _____ (Signature of Contracting Officer)
15. NAME AND TITLE OF SIGNER (Type or print): Thomas W. Moore, Assignee	16. DATE SIGNED: 3/26/68
18. NAME OF CONTRACTING OFFICER (Type or print): G. A. O'NEILL	19. DATE SIGNED

30-101-01

☆ U.S. GOVERNMENT PRINTING OFFICE: 1967—244-063

BEST COPY AVAILABLE

CONTINUATION SHEET

Contract DA-23-195-AMC-01073(T)
Mod P0001
Page 2 of 2 Pages

WHEREAS an appeal was filed and is now pending before the Armed Services Board of Contract Appeals as case No. 12179;

WHEREAS the amount of the liability of EMSCO to the Government is uncertain and unliquidated;

WHEREAS Thomas W. Moore, Jr., Assignee, duly represents the contractor;

WHEREAS both parties, EMSCO and the Government desire to settle the aforesaid disputed claim;

NOW, THEREFORE, in consideration of the premises it is mutually agreed;

1. That EMSCO is liable to the Government on Contract No. DA-23-195-AMC-01073 in the amount of $5,000.00.

2. That the Contracting Officer on behalf of the Government acknowledges said sum as now due and owing from EMSCO to the Government and accepts said amount as full, complete and final settlement of said claim and appeal.

3. That said settlement applies to the claim arising from Contract No. DA-23-195-AMC-01073 only, and does not pertain to any other claim or claims the Government may now possess or which may arise in the future.

4. The parties acknowledge that said sum is an adjusted figure and amount and the assignee agrees that he or his successor assignee will not contest the amount of EMSCO's liability herein above stated in any insolvency proceeding, STATE or FEDERAL.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action File No. 72-H-164

[Filed Mar. 1, 1972, Clerk U.S. District Court, Southern District of Texas. V. Bailey Thomas, Clerk. By Deputy: E. Knoblauch]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS W. MOORE, ESQUIRE, ASSIGNEE FOR THE BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., ETC., DEFENDANT

ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

The defendants, Thomas W. Moore, Jr., Esquire, Assignee for the Benefit of Creditors of Emsco Screen Pipe Company of Texas, Inc. (Defendant Moore) and Emsco Screen Pipe Company of Texas, Inc., a corporation, (Defendant Emsco), for their answer say as follows:

I.

As to Count I, defendants admit the allegations in paragraphs 1 through 6, 8 and 9, and deny the allegations in paragraphs 7, 10 and 11, and deny that plaintiff should be afforded the relief requested. As to the allegations in paragraph 7, defendants admit the reprocurement on November 23, 1966, with excess cost of repurchase in the sum of Forty Thousand Six Hundred Seven and 13/100 Dollars ($40,607.13), but deny indebtedness to plaintiff at that time because of bona fide disputes between Emsco and plaintiff as to Emsco's right to a termination for convenience of the Government. Such disputes were finally resolved against Emsco on May 29,

1969, by the decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 11917 and 12184. No further appeal has been prosecuted.

II.

As to Count II, defendants admit the allegations in paragraphs 12 through 17, and 19 through 22, and deny the allegations in paragraphs 18, 23 and 24, and deny that plaintiff should be afforded the relief requested. As to paragraph 18, defendants admit the excess cost of repurchase was Eight Thousand Four Hundred Thirty-Six and 06/100 Dollars ($8,436.06), but deny the defendants were indebted to plaintiff in that amount because of bona fide disputes between Emsco and plaintiff as to Emsco's liability. Such disputes were not resolved until the execution of the settlement agreement attached as an exhibit to plaintiff's complaint.

III.

As to Count III, defendants admit the allegations in paragraphs 25 through 28, 31, 32 and 35 through 36; defendants deny the allegations in paragraphs 29 and 30, which cannot be understood because of portions inadvertently omitted; defendants deny the allegations in paragraph 33, 34, 37 and 38; and defendants deny that plaintiff should be afforded the relief requested. As to paragraphs 33, 34, 37 and 38; and defendants deny that tiff at the time of the termination for default because of bona fide disputes between plaintiff and Emsco. As to paragraph 34, defendants state on information and belief that the excess costs of repurchase were in the amount of Five Thousand Nine Hundred Fifty-two and no/100 Dollars ($5,952.00), instead of Four Thousand Two Hundred Seventy-two and no/100 Dollars ($4,-272.00) as complained by plaintiff; defendants admit the execution of the settlement agreement with plaintiff in the amount of Five Thousand Dollars ($5,000.00) on March 26, 1968.

IV.

By way of further answer, Defendant Moore asserts that plaintiff is not entitled to priority of payment because in all cases the amounts claimed due from Emsco were not "debts due" to the United States within the meaning of 31 USC § 191. Such claims were disputed and unliquidated at the time of the Assignment for the Benefit of Creditors of Emsco. Any order of distribution issued by this court should provide that plaintiff should receive only its pro rata share of the distributable assets.

WHEREFORE, PREMISES CONSIDERED, defendants pray that plaintiff's claim be denied; that defendants recover all costs of court; and for such other and further relief, general or special, at law or in equity, to which defendants, or either of them, may be justly entitled.

Respectfully submitted,

MOORE, HARRIS & Co.

By /s/ Thomas Osa Harris
THOMAS OSA HARRIS
2000 West Loop South, Suite 1560
Houston, Texas 77027
713-621-4501

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 72-H-164

[Filed Apr. 14, 1972, Clerk, U.S. District Court, Southern District of Texas. V. Bailey Thomas, Clerk. By Deputy: E. Knoblauch]

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS W. MOORE, ESQUIRE, ASSIGNEE FOR THE BENEFIT OF CREDITORS FOR THE EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., DEFENDANT

MOTION FOR LEAVE
TO FILE AMENDED COMPLAINT

COMES NOW the United States of America, by and through the United States Attorney for the Southern District of Texas, and moves this Court to grant leave to the United States to file an amended Complaint for the reason that, by an inadvertent error, paragraph 30 of the Original Complaint filed with this Court was deleted, and the United States would request permission to include paragraph 30 in its Complaint. Defendant's attorney has stated *that he has no objection.*

THEREFORE, the Plaintiff, United States, prays the Court to grant its leave to file an amended Complaint.

Respectfully submitted,

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ Helen M. Eversberg
HELEN M. EVERSBERG
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was sent by certified mail, return receipt requested, to Thomas O. Harris, 1560 Control Data Bldg., 2000 West Loop South, Houston, Texas, on the 14th day of April, 1972.

/s/ Helen M. Eversberg
HELEN M. EVERSBERG
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 72-H-164

[Filed Apr. 17, 1972, Clerk, U.S. District Court, Southern District of Texas. V. Bailey Thomas, Clerk. By Deputy: E. Knolbauch]

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS W. MOORE, ESQUIRE, ASSIGNEE FOR THE BENEFIT OF CREDITORS FOR THE EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., EMSCO SCREEN PIPE CO. OF TEXAS, INC., DEFENDANT

AMENDED COMPLAINT

COMES NOW the United States of America, Plaintiff herein, and sues THOMAS W. MOORE, JR., Esquire, assignee for the benefit of creditors for the Emsco Screen Pipe Company of Texas, Inc., and also sues Emsco Screen Pipe Company of Texas, Inc., a corporation; and alleges.

COUNT I

1. That this is an action brought by the United States of America for and on behalf of the Department of the Navy, an agency and instrumentality of the United States; and jurisdiction is founded in Title 28, U.S.C. § 1345;

2. That the Defendant, THOMAS W. MOORE, JR., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

3. That the Defendant, Emsco Screen and Pipe Company of Texas, Inc., a corporation organized and exist-

ing under the laws of the State of Texas is within the jurisdiction of this Court;

4. That, under the terms of the contract NOO197-66-c-0432, dated June 9, 1966, the Defendant Emsco agreed to furnish the Department of the Navy shield assemblies and fabricated items at a total contract price of $210,-231.18 with deliveries to commence in October, 1966, and final delivery to be completed by June, 1967;

5. That notwithstanding the above terms, the Defendant Emsco made no delivery of said material to the Navy as required by the contract; thereby breaching said contract;

6. That, as a consequence of the Defendant Emsco's failure and refusal to comply with and abide by the terms of the agreement, the contract was terminated on August 31, 1966;

7. That, as a result of the termination for default, the Plaintiff reprocured the said contract on November 23, 1966, wherein Emsco became indebted to the Plaintiff in the sum of $40,607.13 representing excess costs of repurchase of said materials, plus 6% interest per annum from December 1, 1966;

8. That on October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant, THOMAS W. MOORE, JR., and that Defendant Moore is presently the voluntary assignee for the benefit of creditors;

9. That the administrative appeal on this contract (ASBCA 11917 and 12184) has been dismissed with prejudice to the Defendant Emsco;

10. That the Defendants Moore and Emsco have sufficient funds to pay the sum alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. §§ 191 and 192.

11. That, although requested to do so, the Defendants Emsco and Moore have failed and refused to pay the sum alleged hereinabove, or any part thereof, for which they are justly indebted;

Wherefore, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $40,607.13 with interest thereon at the rate of 6% per annum from December 1, 1966, until paid; and, for such other relief to which Plaintiff may be entitled, including costs;

2. Judgment against Defendant, THOMAS W. MOORE, Esq., assignee for the bentfit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession sufficient to satisfy Plaintiff's claim in the sum of $40,607.13 with interest thereon at the rate of 6% per annum from December 1, 1966, until paid; and, for such other relief to which Plaintiff may be entitled, including costs;

COUNT II

12. That this action brought by the United States of America for and on behalf of the Defense General Supply Agency, an agency and instrumentality of the United States; and jurisdiction is founded on Title 28, U.S.C. § 1345.

13. That the Defendant, THOMAS W. MOORE, JR., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

14. That the Defendant Emsco Screen Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas is within the jurisdiction of this Court;

15. That, under the terms of the contract, No. DSA-400-66-C-0751/TM540 dated June 14, 1966, the Defendant Emsco agreed to furnish the Defense General Supply Center, 390 BN, FSN 3990-223-6529 at $92.87 each and 483 BN, FSN 3990-291-9717 at $75.40 each, pallet, material handling on or before August 25, 1966 for a total price of $72,637.50, which total price was subsequently reduced to $71,637.50;

16. That notwithstanding the above terms, the Defendant Emsco made no delivery of said materials to the

Plaintiff as required by the contract, thereby breaching said contract;

17. That, as a consequence of the Defendant's Emsco's failure and refusal to comply with and abide by the terms of the agreement, the contract was terminated on October 19, 1966;

18. That, as a result of the termination for default, the Defendant became indebted to the Plaintiff in the amount of $8,436.06 representing excess costs of repurchase of said materials;

19. That on October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant, THOMAS W. MOORE, JR.;

20. That on August 19, 1968, Defendant Moore and Plaintiff executed a settlement agreement in the amount of $6,072.82 a true copy of which is attached herein and marked Plaintiff's Exhibit A.

21. That pursuant to said settlement agreement, the named parties therein mutually agreed that the liability owed to the Plaintiff under the aforesaid contract is $6,706.82;

22. That the administrative appeal on this contract (ASBCA 12284) has been dismissed with prejudice to the Defendant Emsco;

23. That the Defendants Moore and Emsco have sufficient funds to pay the sum agreed to under the terms of the said settlement agreement alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. § 191 and 192.

24. That although requested to do so, the Defendants Moore and Emsco have failed and refused to pay the agreed settlement amount alleged hereinabove, or any part thereof for which they are justly indebted;

Wherefore, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $6,706.82; and, for such other relief to which Plaintiff may be entitled, including costs;

2. Judgment against Defendant, THOMAS W. MOORE, JR., Esq., assignee for the benefit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession sufficient to satisfy Plaintiff's claim in the sum of $6,706.82; and, for such other relief to which Plaintiff may be entitled, including costs;

COUNT III

25. That this is an action brought by the United States of America for and on behalf of the Department of the Army, an agency and instrumentality of the United States; and jurisdiction is founded on Title 28, U.S.C. § 1345;

26. That the Defendant, THOMAS W. MOORE, JR., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

27. That the Defendant Emsco Screen Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas is within the jurisdiction of this Court;

28. That, under the terms of the contract, No. DA23-195-AMC-01073(T) dated June 8, 1966, the Defendant Emsco agreed to furnish the Department of the Army 400 each of FSN 5420-542-4722 Curb Deck assembly on or before December 5, 1966, for a total price of $27,428.00;

29. That notwithstanding the above terms, the Defendant Emsco made no delivery of said materials to the Plaintiff as required by the contract, thereby, breaching said contract;

30. That on October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant THOMAS W. MOORE, JR.;

31. That, in making the said assignment, the Defendant Emsco anticipatorily breached the aforesaid contract;

32. That, as a consequence of the Defendant Emsco's failure and refusal to comply with and abide by the terms of the agreement, the contract was terminated on December 6, 1966;

33. That, as a result of the termination for default, the Defendant Emsco became indebted to the Plaintiff in the amount of $4,272.00;

34. That the claim for $4,272.00 by the Plaintiff was amended several times and that the said Defendants, Moore and Emsco agreed upon a settlement with the Plaintiff in the amount of $5,000.00, a true copy of which is attached herein and marked Plaintiff's Exhibit B.

35. That pursuant to said settlement agreement, the named parties therein mutually agreed that the liability owed to the Plaintiff under the aforesaid contract is $5,000.00;

36. That the administrative appeal on this contract (ASBCA 12179) has been dismissed with prejudice to the Defendant Emsco;

37. That the Defendants Moore and Emsco have sufficient settlement agreement alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. §§ 191 and 192;

38. That although requested to do so, the Defendants Moore and Emsco have failed and refused to pay the agreed settlement amount alleged hereinabove, or any part thereof, for which they are justly indebted;

Wherefore, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $5,000.00; and for such other relief to which Plaintiff may be entitled including costs;

2. Judgment against Defendant, THOMAS W. MOORE, JR., Esq., assignee for the benefit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession sufficient to satisfy Plaintiff's claim in the

sum of $5,000.00; and, for such other relief to which Plaintiff may be entitled, including costs.

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ Helen M. Eversberg
Assistant United
States Attorney

Of Counsel:

ROGER C. WESLEY
Trial Attorney
Department of Justice,
Civil Division
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 72-H-164

[Filed 5-29-73, V. Bailey Thomas, Clerk, By: M. Prater, Deputy]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE CO. OF TEXAS INC.; EMSCO SCREEN PIPE CO., INC., DEFENDANTS

PRE-TRIAL ORDER

The pre-trial conference was held in the above-entitled action on the 30th day of April, 1973 before the Honorable Ronald J. Blask, United States Magistrate for the Southern District of Texas. Helen M. Eversberg, Assistant United States Attorney, appeared as counsel for plaintiff. Thomas Osa Harris, Esquire, appeared as counsel for defendants.

JURISDICTIONAL QUESTIONS

The parties agree that the Court has full and complete jurisdiction of this action under 28 U.S.C. § 1345.

MOTIONS

There are no motions pending before the Court.

STATEMENT OF THE CASE

In June of 1966 the defendant, Emsco Screen Pipe Company of Texas, Inc., entered into three contracts with the Department of the Navy, Army, and Defense Supply

Agency. The contract with the Navy was terminated by the Navy for the default of Emsco on August 31, 1966. This contract was reprocured on November 23, 1966. The excess costs of reprocurement totaled $40,607.13, plus interest at six percent (6%) from December 1, 1966. This claim was appealed by Emsco to the Armed Services Board of Contract Appeals, and a decision was rendered against Emsco.

The Defense Supply Agency terminated its contract for Emsco's default on October 19, 1966. Subsequently, they reprocured at an excess cost of $8,436.06, which figure was reduced by agreement to $6,072.82 on August 19, 1968, the latter amount presently representing the amount of the Government's claim.

The Army terminated its contract with Emsco for default on December 6, 1966. Thereafter the amount of $5,000 was reached by agreement as the amount of the Government's claim.

On October 20, 1966 the defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit creditors to the defendant Thomas W. Moore, Jr., who continues to be the voluntary assignee.

CONTENTIONS OF THE PARTIES

The United States of America contends that it is entitled to the full amount of its claims against Emsco by virtue of the priority accorded the Government under the Federal insolvency statute (31 U.S.C. § 191). The United States further contends that its claims against Emsco were sufficiently liquidated to come within the meaning of the Federal insolvency statute.

The defendants assert that the United States is entitled only to its pro rata share of the assets held by the assignee, and that the claims of the Government were not sufficiently liquidated so as to give the United States a priority under 31 U.S.C. § 191 for the full amount of its claims.

FACTS

The parties herein have entered into a Stipulation of Facts, and therefore there are no contested issues of fact. A copy of said Stipulation is attached hereto and made a part hereof, and contains the facts upon which the parties are presenting this matter to the Court.

CONTESTED ISSUES OF LAW

A. Whether the claims of the Government were sufficiently liquidated at the time of defendant Emsco's assignment for the benefit of creditors to be a "debt" within the meaning of 31 U.S.C. § 191.

B. Whether the United States is entitled to absolute priority over other creditors by virtue of 31 U.S.C. § 191 to the funds now held by the assignee for the benefit of creditors.

EVIDENCE

The parties will offer jointly in evidence all the exhibits referred to in the parties' Stipulation of Facts. There are no contested exhibits.

WITNESSES

No witnesses will be called by either party.

TRIAL

The parties, having stipulated the facts herein, submit this cause on briefs and, at the pleasure of the Court, on oral argument

This matter has been set for trial for Monday, May 28, 1973 at 9:30 o'clock a.m. (at which time all counsel shall appear) or as soon thereafter as the business of the Court will allow.

APPROVAL RECOMMENDED:

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ Helen M. Eversberg
HELEN M. EVERSBERG
Assistant United States Attorney

/s/ Roger C. Wesley
ROGER C. WESLEY
Civil Division, Department of Justice
Attorneys for Plaintiff

/s/ Thomas Osa Harris
THOMAS OSA HARRIS
Attorney for Defendants

/s/ Peter T. Fay
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 72-H-164

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS W. MOORE, ESQUIRE, ASSIGNEE FOR THE BENEFIT OF CREDITORS FOR THE EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., DEFENDANTS

STIPULATIONS

Now come the parties and agree that the above numbered cause may be submitted to the court upon the following stipulations.

I.

In June, 1966, the defendant Emsco entered into a contract with the Department of the Navy (NOO 197-066-0432) under which Emsco agreed to furnish the Navy certain shield assemblies and fabricated items at a total contract price of $210,231.18 with deliveries to commence in October, 1966, and final delivery to be completed by June, 1967. The contract was terminated by the Navy on August 31, 1966 and default by Emsco was declared for refusing to comply with the delivery terms of the agreement. The Navy reprocured the said contract on November 23, 1966. The excess costs of reprocurement totalled $40,607.13, with interest running at six percent per annum from December 1, 1966.

II.

On June 8, 1966, Emsco entered into a contract with the Department of the Army (No. DA23-195-AMC-01073 (T)) under which Emsco was to furnish the Army 400 each of FSN 5420-542-4722 Curb Deck assemblies on or

before December 5, 1966, for a total price of $27,428.00. The defendant Emsco made no delivery of the materials designated, thereby breaching its contract. For the refusal to comply with the terms of the contract, the Army terminated the contract on December 6, 1966, leaving a claim of $4,272.00. After several amendments to the claim, a settlement agreement was entered into by the parties on March 26, 1968, providing for liability of $5,000.00. A true copy of such settlement agreement is attached as Exhibit "A". Although the Army contract was not officially terminated until December 6, 1966, Emsco had repudiated the contract in August, 1966. The Army notified Amsco on August 21, 1966 of its intention to treat the contract as terminated.

III.

On June 14, 1966, Emsco entered into a contract with the Defense Supply Agency (No. DSA-400-66-C-0751/TM540) under which Emsco was to furnish Defense Supply certain pallets, designated as 390 BN, FSN 3990-233-6529 at $92.87 each and 483 BN, FSN 3990-291-8717 at $75.40 each, to be delivered on or before August 25, 1966, for a total price of $72,637.50. None of these items were delivered, creating a material breach by Emsco and causing the Defense Supply Agency to terminate the said contract on October 19, 1966. As a result of the default, on January 7, 1967, the Defense Supply reprocured at a cost of $8,436.06, the amount representing the excess costs of repurchasing the materials. By virtue of a subsequent settlement agreement on August 19, 1968 between the parties, the amount of the claim was reduced to $6,072.82. A true copy of such settlement agreement is attached as Exhibit "B".

IV.

All of the above claims were subsequently appealed and dismissed with prejudice to the Defendant, Emsco. (See Armed Services Board of Contract Appeals 11917 and 12184 for dismissal of Navy claims Armed Services Board of Contract Appeals 12179 for dismissal of Army

claims, the Armed Services Board of Contract Appeals 12284 for dismissal of Defense Supply Agency claims).

V.

On October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant, Thomas W. Moore, Jr., who continues to be the voluntary assignee for the benefit of Emsco's creditors. While two of the claims (Navy and Defense Supply) were already terminated for default prior to the said assignment, the Army claim was not terminated until December 6, 1966. All of Plaintiff's claims were finalized as to the exact amounts after the aforesaid assignment—the Navy's on November 23, 1966, by reprocurement, the Army's on March 26, 1968, by agreement of the parties and the Defense Supply's on August 19, 1968 by agreement of the parties. Emsco contended at the time of termination of the contracts and at the time of the government's claim for excess costs, that it had a right for termination for the convenience of the government. Such disputes were finally resolved by the settlement agreements mentioned above and the decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 11917 and 12184 on May 29, 1969. A true copy of such opinion is attached as Exhibit "C".

VI.

Thomas W. Moore, Jr., as assignee for benefit of creditors of the Defendant, Emsco, has available for distribution to the creditors of the Defendant, Emsco, the amount of $55,707.28 plus interest from January 1, 1969 at the approximate rate of four and one half percent per annum, less $2,500.00 paid for bond premiums and $390.00 paid for warehouse charges. In the interest of certainty, it is agreed that a judgment will be entered in favor of the United States and against Thomas W. Moore, Jr. on a portion of such $55,707.38 as determined by the Court, without prejudice to the right of the United States government to receive additional sums from such assignee

on final distribution. It is further agreed that the United States government will make no attempt to execute or levy on such judgment until all avenues of appeal have been exhausted, and no supersedeas bond will be required It is understood and agreed that interest on such amounts earned by the assignee shall be used for administrative expenses indicated above and reasonable administrative expenses of litigating the question of the priority of the United States government and reasonable administrative expenses of distributing the assets of Emsco to its creditors, including the United States government.

The total claim of the United States herein is $67,-313.70, including interest to June 1, 1973 in regard to the Navy contract. In addition to the claim of the United States, Emsco owes $5,992.73 plus six percent interest from January 7, 1970 to the City of Houston and $68,-758.91 to creditors consenting under the assignment for benefit of creditors. A conformed copy of the judgment in favor of the City of Houston is attached as Exhibit "D".

VIII.

The court may consider these stipulations and the attached exhibits as evidence in this cause. The court may consider the attached opinion of the Armed Services Board of Contract Appeals as a true account of the facts and circumstances of Emsco at the time of the termination of the contract with the Department of the Navy and the contentions made by Emsco concerning its right

for termination for the convenience of the government without excess costs.

Signed this 28th day of May, 1973.

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ Helen M. Eversberg
Assistant United
States Attorney
Attorneys for Plaintiff
MOORE, HARRIS & Co.

By: /s/ Thomas Osa Harris
THOMAS OSA HARRIS
Attorneys for Defendants

Mrs. Compton/rt/X1 3-3311/5 AMDT-PDO-C 66-290-C

STANDARD FORM 30, JULY 1966 GENERAL SERVICES ADMINISTRATION FPR. 7DOC. REG. (41 CFR) 1-16.101

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

PAGE 1 OF 2

1. AMENDMENT/MODIFICATION NO.	2. EFFECTIVE DATE	3. REQUISITION/PURCHASE REQUEST NO.	4. PROJECT NO. (If applicable)
P0001	1 Apr 68	W[illegible]-23-195-[illegible]	

5. ISSUED BY [illegible]-PDO-C CODE

U. S. Army Mobility Equipment Command
Directorate of Procurement & Production
4300 Goodfellow Boulevard
St. Louis, Missouri 63120

6. ADMINISTERED BY (If other than block 5) CODE

Defense Contract Administration Services Office, Houston
P. O. Box 61167
Houston, Texas 77061

7. CONTRACTOR NAME AND ADDRESS (Street, city, county, state, and ZIP Code) CODE FACILITY CODE

Thomas W. Moore
Assignee for Benefit of Creditors
Emsco Screen Pipe Co. of Texas, Inc.
Houston, Texas 77021

8. ☐ AMENDMENT OF SOLICITATION NO. _____ DATED _____ (See block 9)

☒ MODIFICATION OF CONTRACT/ORDER NO. DA 23-195-[illegible]-01073(Z) DATED 8 June 1966 (See block 11)

9. THIS BLOCK APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in block 12. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offerors must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation, or as amended, by one of the following methods: (a) by signing and returning _____ copies of this amendment; (b) by acknowledging receipt of this amendment on each copy of the offer submitted; or (c) by separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If, by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

10. ACCOUNTING AND APPROPRIATION DATA (If required)

21X2030 66D-3070 Pl730-31 S23-195 Supplies
21X2030 66D-3070 Pl730-22 S23-195 Transportation

11. THIS BLOCK APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

(a) ☐ This Change Order is issued pursuant to _____
The Changes set forth in block 12 are made to the above numbered contract/order.

(b) ☐ The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in block 12.

(c) ☒ This Supplemental Agreement is entered into pursuant to authority of 10 U.S.C. 2304(a)(1)
It modifies the above numbered contract as set forth in block 12.

12. DESCRIPTION OF AMENDMENT/MODIFICATION

WHEREAS Supply Contract No. DA-23-195-[illegible]-01073 was awarded to Emsco Screen Pipe Company of Texas, Inc., hereinafter referred to as EMSCO, by the United States of America, hereinafter referred to as the Government, on 8 June 1966;

WHEREAS a general Assignment for the Benefit of Creditors was made by EMSCO on 20 October 1966, to Thomas W. Moore, Jr. as Assignee for Benefit of Creditors;

WHEREAS the aforesaid contract was terminated by the Government for default on 6 December 1966;

WHEREAS the Government contends a repurchase and reprocurement was effected on 9 June 1967, which resulted in $5,952.00 excess costs;

WHEREAS a demand was made by the Government on 21 July 1967, for payment of the aforesaid sum;

WHEREAS the Assignee for Benefit of Creditors contends that EMSCO does not owe the Government for excess costs under the aforesaid contract and that such contract should have been terminated for the convenience of the Government;

Except as provided herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect.

13. ☐ CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT ☒ CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 6 COPIES TO ISSUING OFFICE

14. NAME OF CONTRACTOR/OFFEROR	17. UNITED STATES OF AMERICA
BY Assignee for Benefit of Creditors of Emsco Screen Pipe Co. of Texas, Inc. (Signature of person authorized to sign)	BY _____ (Signature of Contracting Officer)
15. NAME AND TITLE OF SIGNER (Type or print): Thomas W. Moore, Assignee	16. DATE SIGNED: 3/26/68
18. NAME OF CONTRACTING OFFICER (Type or print): G. A. O'NEILL	19. DATE SIGNED: [illegible]

30-101-01

☆ U.S. GOVERNMENT PRINTING OFFICE: 1967—[illegible]

BEST COPY AVAILABLE

CONTINUATION SHEET

Contract DA-23-195-AMC-01073(T)
Mod P0001
Page 2 of 2 Pages

WHEREAS an appeal was filed and is now pending before the Armed Services Board of Contract Appeals as case No. 12179;

WHEREAS the amount of the liability of EMSCO to the Government is uncertain and unliquidated;

WHEREAS Thomas W. Moore, Jr., Assignee, duly represents the contractor;

WHEREAS both parties, EMSCO and the Government desire to settle the aforesaid disputed claim;

NOW, THEREFORE, in consideration of the premises it is mutually agreed;

1. That EMSCO is liable to the Government on Contract No. DA-23-195-AMC-01073 in the amount of $5,000.00.

2. That the Contracting Officer on behalf of the Government acknowledges said sum as now due and owing from EMSCO to the Government and accepts said amount as full, complete and final settlement of said claim and appeal.

3. That said settlement applies to the claim arising from Contract No. DA-23-195-AMC-01073 only, and does not pertain to any other claim or claims the Government may now possess or which may arise in the future.

4. The parties acknowledge that said sum is an adjusted figure and amount and the assignee agrees that he or his successor assignee will not contest the amount of EMSCO's liability herein above stated in any insolvency proceeding, STATE or FEDERAL.

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
125th JUDICIAL DISTRICT

No. 736,999

THE CITY OF HOUSTON

vs.

EMSCO SCREEN PIPE COMPANY OF TEXAS

FINAL JUDGMENT

BE IT REMEMBERED that on the 10th day of September, 1969, came on to be heard before the Court the above numbered and entitled cause and came the Plaintiff, CITY OF HOUSTON, on behalf of itself and for the HOUSTON INDEPENDENT SCHOOL DISTRICT, and the Defendants EMSCO SCREEN PIPE COMPANY OF TEXAS and THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, came the parties by their attorneys and submitted the matters in controversy to the Court without the intervention of a jury. The pleadings, the evidence and the arguments of counsel having been heard and fully understood, it is the opinion of this Court that the Plaintiff is entitled to judgment against the Defendants;

IT IS THEREFORE, ORDERED, ADJUDGED, and DECREED that the CITY OF HOUSTON do have and recover of and from EMSCO SCREEN PIPE COMPANY OF TEXAS and THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, but not individually, the sum of FIVE THOUSAND NINE HUNDRED NINETY-TWO and 73/100 ($5,992.73) DOLLARS. The judgment is composed of the following amounts.

Taxes due for 1966	$2,050.17
Taxes due for 1967	2,346.51
City Interest & Penalty	551.88
School Board & Interest Penalty	534.17
Attorneys Fees	500.00
TOTAL	$5,992.73

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the personal judgment awarded Plaintiff for each of the "AMOUNTS" set out above shall bear interest from the date hereof at the rate of six per cent per annum until paid for each of which personal judgments let execution issue.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff recover all costs of this suit.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the tax [illegible] payment of the total of said "AMOUNTS", aforesaid, be, [illegible] are hereby, foreclosed as the same existed in favor of the City of Houston and the Houston Independent School District as they [illegible] on the first day of January of each of the years aforesaid on the personal property described as follows, to-wit:

> merchandise, furniture, fixtures, machinery, equipment, and auto,

against the rights, title, interest, liens, and claims of each and all of the said hereinbefore mentioned Defendants or any person or persons claiming under said Defendants by, through, or under any right, title, or interest acquired prior to or during the pendency of this [illegible].

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that an Order of Sale issue directing any sheriff or any constable to seize and sell the property aforesaid as under execution in satisfaction of this judgment, or so much thereof as may be necessary to recover the total amount of taxes, penalties, interest, and costs adjudged to be a lien against it, as provided by law.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that any and all processes shall issue by the clerk of this Court ordering the proper officers to place the purchaser or purchasers, their heirs, executors or assigns in possession of the property so purchased, or any part thereof at the sale provided for in this judgment.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that in no event shall the personal judgments and lien foreclosures provided for herein permit to any extend a double recovery.

SIGNED, RENDERED, and ENTERED this the 7 day of January, 1970.

/s/ Dixon
Judge

APPROVED as to form only

/s/ E. A. Lucas, Jr.
Attorney for Plaintiff, City of Houston (and Houston Independent School District)

APPROVED as to form only

/s/ Thomas Osa Harris
Attorney for the Defendant

ARMED SERVICES BOARD
OF CONTRACT APPEALS

ASBCA Nos. 11917 and 12184

Appeals of—
EMSCO SCREEN PIPE COMPANY OF TEXAS, INC.

(Thomas W. Moore, Jr., Assignee for the Benefit of Creditors)

Under Contract No. N00197-66-C-0432

APPEARANCES FOR THE GOVERNMENT:

William Sellman, Esq., Counsel
Naval Supply Systems Command
William Klein, Esq.
Assistant Counsel

APPEARANCES FOR THE APPELLANT:

Thomas W. Moore, Jr., Esq.

OPINION BY MR. KENNEDY

This consolidated proceeding involves appeals from decisions of the contracting officer terminating the contract for default and assessing excess costs. Awarded June 9, 1966, the contract called for Emsco Screen Pipe Company of Texas, Inc., to furnish 810 shield assemblies and various quantities of fabricated parts for naval mines, in accordance with contract drawings and specifications. The award covered some 23 items for a total amount of $210,231.18.

On August 5, 1966, Emsco requested the contract be "voided without penalty" due to certain allegedly supervening circumstances. By letter of August 15, 1966, the contracting officer notified Emsco that the reasons cited for cancellation of the contract were not considered excusable, that its failure to perform was anticipated (first deliveries were due October 20, 1966) and there-

fore it was called upon to cure its failure to make progress or show cause within 10 days why the contract should not be terminated for default.[1] (Exh. N-6) In reply, Emsco requested an extension of time as a matter of right or a termination for convenience.

The contracting officer, however, found that the contractor's admitted inability to perform on time, or to show why it would be in the Government's interest to extend the time for performance, was tantamount to repudiation and abandonment of the contract. (Tr. 166-169, 176-177) Accordingly, on August 31, 1966, the contracting officer terminated the contract for default for failure to make progress so as to endanger performance within the meaning of Clause 11(a)(ii) of the General Provisions (Default). (Exh. N-11)

On September 23, 1966, Emsco noted a timely appeal from the default termination, and on October 20, 1966, made an assignment for the benefit of creditors.[2] Utilizing formal advertising procedures, a repurchase contract was awarded to the second low bidder on the original procurement on November 23, 1966, in the amount of $249,776.41. Excess costs in the amount of $40,398.66 were assessed and demand made for payment by decision of the contracting officer dated December 1, 1966. (Exhs. N-14, 15, 18) An appeal from this decision was noted on January 6, 1967. The timeliness of this appeal is not in issue. *El-Tronics, Inc.*, ASBCA No. 5457, 61-1 BCA ¶ 2961.

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[1] As to the adequacy of this notice, which is not herein challenged, see *American Marine Upholstery Company* v. *United States*, 170 Ct. Cl. 564, 571-572 (1965). (Notice to show cause or cure may rely upon knowledge in contractor's possession as to causes for failure to make progress.)

[2] In its interlocutory order of December 21, 1967, the Board found this to be a "general assignment" for the benefit of creditors and, as such, an assignment by "operation of law" exempt from the prohibitions of the anti-assignment act. *E. Harold Patterson, Receiver for the Electro Nuclear Systems Corp.* v. *United States, et. al.*, 173 Ct. Cl. 819, 823-827 (1965). On January 15, 1968, appellant-assignee filed a statement of authority under the laws of the State of Texas to act for the dissolved Emsco Corporation and to prosecute and defend claims on behalf of said corporation. (Tr. 1-5)

Appellant-assignee seeks a termination for convenience on the ground that the Government's progress failure termination was premature or that its failure to authorize promised progress payments made it impossible for Emsco to accomplish timely performance. The assignee also seeks a declaration of invalidity of the contract on the ground that at the time of award the contracting officer knew or should have known that Emsco was not a responsible bidder within the meaning of Section 1, Part 9, of ASPR. (Appellant-Assignee's Prehearing Brief, pp. 1-3) Finally, the assignee has challenged the propriety of the assessment of excess costs, principally on the ground that they had not actually been incurred. (Tr. 178-181)

Respondent claims that appellant's financial plight was not due to causes beyond its control and without its fault or negligence, and that since the pre-award determination of Emsco's financial responsibility was for the guidance, benefit, and protection of the Government, it conferred no right on appellant to avoid performance of the contract. (Respondent's Prehearing Brief, pp. 1-2)

In arriving at the findings and conclusions hereinafter set forth, the Board has given careful consideration to the testimony of the witnesses on both direct and cross-examination, and adjudged its fair worth in the light of the circumstances disclosed and the contemporaneous documentary record.

FINDINGS OF FACT

1. *The Determination of Responsibility*

Emsco Screen Pipe Company of Texas, Inc. (hereinafter Emsco) was low bidder on a formally advertised procurement for shield assemblies and fabricated parts, opened April 27, 1966. The Invitation for Bids issued March 28, 1966, and provided that the procurement was a "100% Set-Aside for Small Business." It further specifically provided that the clause entitled "Progress Payments (Nov. 1964)" was attached thereto and made a part thereof. (Exh. 1, Continuation Sheet 26) In ac-

cordance with ASPR Appendix E-501.4 the IFB further provided that:

> "The need for progress payments conforming to regulations (Appendix E, Armed Services Procurement Regulation) will not be considered as a handicap or adverse factor in the award of contracts. Bidders desiring progress payments in accordance with the Progress Payment Clause attached hereto, shall include a written request therefor in their bids, and bids including requests for progress payments will be evaluated on an equal basis with bids not including a request for progress payments. *If a bid does not contain a request for progress payment provision, the Progress Payment Clause will not be included in the contract as awarded.*" (Exh. 1, Continuation Sheet 22) (Emphasis added)

On April 26, 1966, Emsco transmitted its bid in response to the IFB accompanied by a letter which stated:

> "Enclosed please find our bid in duplicate for the subject invitation. In making this bid we take cognizance of Amendment No. 001 dated April 14, 1966. We thank you for this opportunity to submit our bid.
>
> "Yours very truly,
>
> EMSCO SCREEN PIPE COMPANY
>
> [Signed] D. E. O'Connor"

Emsco's bid did not include a written request for progress payments because, according to its president, Mr. C. E. Johnson, Emsco was under the mistaken impression that progress payments would automatically be included in any contract awarded. (Tr. 14) This apparently stemmed from Emsco's familiarity with a prior form which provided that progress payments would be

included if a box were checked, "Yes".[3] The oversight was not discovered until the individual authorized to receive bids called Emsco on the afternoon of April 27, 1966, to advise that it was the apparent low bidder. (Tr. 14-17, 171, 173) At that time Emsco's president explained that if awarded the contract, Emsco would require progress payments. The buyer instructed him to put his request in writing. (Tr. 15) This Emsco did in a letter addressed to the contracting officer dated May 2, 1966. It stated:

> "The bid set of the subject IFB which we submitted dated April 26, 1966, included a section entitled 'Progress Payments (Nov. 1964)' which states that progress payments will be made to the contractor as work progresses from time to time upon request—.
>
> "With similar bids which we have submitted to the Armed Services from time to time, it was necessary to check an appropriate box in the bid set if progress payments would be requested. In the subject bid set there was no box to check and we assumed then that progress payments would be made if requested after placement of the contract by you.
>
> "Please consider this letter as our request for progress payments in the event the contract for the subject bid is placed with us by your Department.
>
> "Yours very truly,
>
> EMSCO SCREEN PIPE COMPANY
>
> [Signed] D. E. O'Connor"

Upon receipt of this letter, the buyer noted in the lower right hand corner, "Too Late Bids Opened 4/27". (Exh.

[3] Compare *R. H. J. Corporation*, ASBCA No. 9922, 66-1 BCA ¶ 5361, at p. 25,147; reconsideration denied 66-1 BCA ¶ 5625.

N-3; Tr. 156, 162) She then filed the letter, along with other documents relating to the bids, and took no further action to call Emsco's request to the attention of the contracting officer, either before or after award. (Tr. 156-157, 173-175) The contracting officer testified that Emsco's request of May 2 was never answered and that he did not become aware of the request until he received Emsco's letter of August 5, 1966. This letter stated:

> "In reference to the above-captioned contract, the following conditions are in evidence affecting the performance on this contract:
>
> 1. We requested progress payments to be made on our bid in separate letter which was necessitated by our not interpreting the need for said special request; this letter dated 2 May 1966 and addressed to your personal attention. This has necessitated additional finance which due to tight money market existing at the present has been impossible for us to obtain, all private sources being exhausted and S.B.A. requests at present not completed.
> 2. Schedules of the delivery of raw materials from the supplier completely changed from date of bid offering in many instances tripling from 5 to 6 weeks to more than 150 days where response can be secured; those suppliers responding dwindling very rapidly.
> 3. A meeting held with the Houston banks and Mr. John P. Danko, Administrative Contracting Officer, stationed in Houston, revealed that the Houston banks were not interested and would not perform on advances requested from them on DD250 delivery receipts. This necessitated additional capital as it lengthened the period of receiving payment from the government from approximately 15 days to a minimum of 120 days, even where accelerated delivery would be made. The failure of banking institutions in Houston to handle same has placed a decided additional hardship on contract holders.

> "Taking into consideration the above facts, it will be impossible for Emsco Screen Pipe Company to meet schedules of delivery as set forth in captioned contract and unless relief is given, impossible to perform regardless of time element as additional steel prices and the fact that mills are running at full capacity makes it impossible to secure proper materials.
>
> "We, therefore, request that the contract be voided without penalty due to the fact that purchasing agent failed to comply with our request for progress payments as set forth in above-mentioned letter of request; that Houston banks have refused to handle DD250 delivery receipts, funding same for the benefit of the contractor; the lengthening of delivery periods from 15 days to from 120 to 150 days on materials vital to this contract and because of the crowded mill conditions in many instances suppliers refusing to respond on requests for materials.
>
> "It is our feeling that due to the above-mentioned conditions prevailing now and the failure of the purchasing agent to comply with our request that this contract be voided without penalty due to said conditions which are completely beyond the control of the bidder and were in no way apparent at the time of the bidding. We feel that our request is justified and that both parties are equally responsible for conditions existing." (Exh. N-4; Tr. 156-157, 160)

The contracting officer further testified that prior to August 5 and during the period May 2 to August 4, 1966, he received no other communication from Emsco with respect to progress payments. (Tr. 157-158)

In this connection, Emsco's president testified that shortly after he sent the request of May 2 he had two other conversations with the buyer but he did not say whether they involved the request for progress payments. (Tr. 18, 35-36) Prior to August 5, he made no other inquiry because he felt that he had followed instructions and thought the authorization for progress payments

would come through in due course.[4] (Tr. 35-36) Thus, despite the fact that Emsco's president felt that progress payments were "very important" and that the company's ability to perform "turned on the Government's willingness to provide progress payments", he made no attempt during the period between June 9, the date of award, and August 5, to insure their prompt authorization. (Tr. 37, 157)

In explanation of this seeming lack of interest, the assignee points out that the record shows that at the time of the pre-award survey, conducted on May 24, 1966, Emsco's president advised the Government's industrial specialist that the Company needed progress payments in order to be able to perform. (Exh. N-16, "Remarks"; Tr. 19, 20, 74) This so impressed the industrial specialist that he included a copy of Emsco's request of May 2 as a part of the pre-award survey and recommended progress payments "to insure the contractor's ability to perform." (Exh. N-5, p. 4) Furthermore, in his evaluation of Emsco's performance capability, the industrial specialist stated:

> "Contractor failed to request progress payments at the time he submitted bid package. He stated progress payment request was sent to buyer for consideration. (Attached letter of May 2, 1966 to Miss Doris Halliday) Progress payments are desired if awarded the contract." (Exh. N-16, "Remarks")

In approving award of the contract to Emsco, however, the Pre-Award Survey Board noted that the contractor had not requested Government financing of material purchases or subcontracts. (Exh. N-16, p. 1) It also noted

[4] The record shows that between May 2 and August 5 Emsco's contract administrator wrote a total of eight letters to the administrative contracting officer in Houston or the procurement contracting officer in Louisville but failed to raise any question about the delay in approving Emsco's request for progress payments. (Exh. 27 A-K) In a letter dated June 22, 1966, some six weeks after the May 2 request, the contract administrator stated that "in reviewing the bid set and contract" he noted that he had not received various forms and instructions but made no reference to the Government's failure to act on his request for progress payments. (Exh. 27-K)

the letter from Emsco of May 2, 1966, requesting authorization of progress payments for incurred costs.

For some unexplained reason, probably attributable to Emsco's lack of understanding or confusion over the distinction between partial payments, progress payments and advance payments, Emsco had advised the Government's financial analyst, during the course of the pre-award survey, that neither progress payments nor advance payments were desired. (Exhs. N-16, p. 7, N-20B; Tr. 92; Compare Tr. 32-33) Instead, Emsco had advised him that the only financial aid requested was "Prompt payments on partial shipments as completed; contract extending from September 1966 through August 1967." (Exh. N-20F; Tr. 91) The pre-award survey also shows that Emsco and its banking reference further advised the Government's financial analyst that the contract would be financed from the company's own resources and that a commercial line of credit secured by assignment of the contract would be established on or about June 9.[5] (Tr. 99-101; Exhs. N-23, N-16, p. 7) At the hearing, Emsco's president testified that he had made tentative arrangements to assign his requests for progress payments as accounts receivable to a bank other than the one to which he referred the financial analyst at the time of the pre-award survey. He could produce no documentation to support this, however, and later admitted it was possible that this arrangement did not hinge on assigning requests for progress payments as

[5] On May 31, 1966, Mr. Pace, the Assistant Vice President of the Capital National Bank, Emsco's banking reference, wrote the following letter to the Government's financial analyst:

> "It was certainly a pleasure talking with you over the phone regarding the Emsco Screen Pipe Company order. We were looking forward to being able to furnish to you the financial responsibility you requested on Mr. Johnson's order. It is entirely possible that the necessary details that we require will be answered in the near future and we will then be able to meet your requirements." (Exh. N-23)

The record further shows in a subsequent conversation Mr. Pace gave the Government's financial analyst to understand that a line of credit would probably be established for Emsco by the 9th or 10th of June. (Tr. 99-100)

accounts receivable. (Tr. 34, 38-39) Based upon the information furnished by Emsco, and his own analysis, the financial analyst concluded that even without a commercial line of credit the contractor had sufficient working capital to sustain a monthly cash flow of $23,000 to $24,000 and that this would be adequate to finance performance of the contract over its projected 9-month delivery schedule. (Tr. 101-102, 110-112)

Because the financial analyst failed to appreciate the significance of the fact that at least 60% of the accounts receivable were more than 90 days old (Tr. 117), or to ascertain that they were in any event largely uncollectible (Exh. AA-4b) or that projections of cash flow to be generated from sales of current inventory were probably unrealistic in view of the level of current indebtedness (Tr. 110), a cash balance of only $918 (Exh. N-16, p. 7) and a sharp decline in first quarter 1966 sales, it appears that the Government was mistaken in approving Emsco's financial responsibility without knowing that it had an assured line of private or Government financing to cover its working capital needs.

On the basis of the record as a whole, however, including pressure to make a timely award to the apparent low, responsive and responsible bidder (Tr. 99), we can find no abuse of discretion on the part of the contracting officer in awarding the contract to Emsco.

2. *The Default Determination*

The industrial specialist made his first post-award visit to Emsco's plant on June 22, 1966. At this time, Emsco had placed no firm orders with its materials suppliers or with any of the verified sources of supply presented during the pre-award survey. (Tr. 60-61) During this visit, the industrial specialist reviewed with Emsco's president, chief engineer and contract administrator, the engineering work required, the drawings, the contractor's materials list and a proposed schedule for their procurement. It was ascertained that the engineering staff had not completed its final evaluation of what would be required to accomplish the over-all manufacturing process. (Tr. 60) No other progress was apparent and no reference was made to any delay in commencing performance because of any act or failure to act on the part of the Government.

On July 5, 1966, the industrial specialist made a second plant visit. He again found that no firm purchase orders had been placed for the materials necessary to fabricate the critical items which were Items 1, 16, and 20. These items, and particularly Item 1, the shield assembly, were deemed critical because they required steel fabrication and because the lead time on this material at the time of bid and award was 100 to 120 days (Tr. 55, 68-69), whereas first deliveries were due approximately 130 to 140 days after award. (Exh. N-1, Award, p. 3) The principal excuse offered was that the contractor was doing further research and evaluation before placing orders. Reference was also made to the fact that Emsco had not heard about its request of May 2 for approval of progress payments. There was no indication, however, that this was in any way impairing Emsco's ability to make progress. (Tr. 62)

When the industrial specialist inquired as to why the contractor had not placed firm purchase orders for the other 20 contract items, all of which were considered to be shelf items, he was advised that they had not been ordered because the contractor "didn't know whether he would be able to pay for them or not." (Tr. 63) When the industrial specialist pointed out that upon receipt these items could be immediately shipped and payment received from the Government in less than 30 days under the acceleration provisions of the contract, he met the same response. Emsco's credit position had apparently deteriorated to the point where its suppliers would ship it only on a C.O.D. basis. Despite this, the industrial specialist did not think that progress was being sufficiently endangered to require action by the contracting officer. No report of this or of his earlier visit was made to the contracting officer. (Tr. 72-73, 170)

The third plant visit was made on August 1. At this time it appeared that again no progress had been made toward purchasing any of the shelf items or materials for the critical items because of Emsco's inability to

assure payment to its suppliers. (Tr. 64) Furthermore, the industrial specialist was told that no monthly production progress report had been made for the month of July as no progress worth reporting had been made. (Tr. 66)

As a result of this visit, the industrial specialist concluded that progress was definitely being endangered and immediately moved to set up a meeting between the contractor and the administrative contracting officer. (Tr. 65) At this meeting, on August 3, 1966, Emsco was advised that the Government did not think it could perform the contract. (Tr. 46) Emsco apparently did not deny this, but as an excuse for its nonperformance claimed that in addition to its financial difficulties and the Government's failure to authorize progress payments the price of steel had increased to the point where purchases of steel materials needed for performance would result in a loss on the contract.[6] (Tr. 135-137) Emsco also pointed out that an increase in lead time on steel materials, which the industrial specialist agreed amounted to 50 days over the lead time at the time of bid and award, made it impossible to meet the contract delivery schedule. (Tr. 68-69)

As a result of this meeting Emsco sent the aforementioned letter, dated August 5, 1966, to the contracting officer in Louisville, Kentucky, with a copy to the administrative contracting officer (hereinafter "ACO") in Houston. Emsco pointed out the Government's failure to act on its request for progress payments, its inability to obtain private financing,[7] and the increase in lead

[6] On August 3, 1966, the Steel Industry announced a 2.1% increase in the prices of most steel products, effective August 10. This increase applied even to orders placed before the effective date of the increase because of the industry policy of charging the price in effect at the time of shipment rather than at the time of placement of an order. New York Times Index, 1966, p. 1080, Col. 3.

[7] As noted, Emsco, at the time of the pre-award survey, advised the Government that it expected to have a line of credit with the Capital National Bank. (Exhs. N-20A, N-23, N-16; p. 7; Tr. 100-101) At the hearing Ensco's president made no reference to the Capital National Bank. Instead, he testified that he had made tentative arrangements to obtain working capital from the Medical Center National Bank of Houston. (Tr. 19-20). He could not say that the delay in securing authorization for progress payments precluded obtaining a binding commitment from the Medical Center National Bank. (Tr. 34, 38-39) Nor did he explain why the expected line of credit with the Capital National Bank never materialized.

time on raw materials. It concluded that "unless relief is given" it would be "impossible to perform regardless of time element" because of the increase in steel prices and the shortage of available sources of supply for the steel needed. Emsco requested that the "contract be voided without penalty" because it felt that "both parties are equally responsible for conditions existing."

The contracting officer interpreted this letter as indicating Emsco was probably not going to perform. (Tr. 166) But in order to give the relief requested the contracting officer immediately authorized approval of an amendment to the contract to include progress payments. (Tr. 42, 160-161; Exh. N-1, Mod. P003) This was accomplished on August 11, 1966.

In the interim, the contracting officer received the report of the ACO and the industrial specialist concerning the plant visit of August 1 and the meeting of August 3. (Exh. N-5) This report, dated August 8, shows that the reason for Emsco's inability to procure materials was the fact that its suppliers would sell it only "C.O.D. or thirty days net", whereas its "lapsed time" in receiving payment from the Government for delivered items was expected to be "120 to 150" days. The report of the ACO and the industrial specialist further stated that from the standpoint of time the contractor could still meet the delivery schedule on shelf items[8] but that delivery on the critical items had advanced from 60 days at the time of bid in April[9] to 120 to 150 days in August.

[8] First deliveries on these items were due in October, November, and December, 1966, and February 1967.

[9] The record contains no explanation for the discrepancy between this estimate of lead time and the industrial specialist's testimony that at the time of bid his estimate was 100 to 120 days. (Tr. 55, 68-69).

(Exh. N-5) This report further stated that delivery on Item 1, due October 20, 1966, could not be accomplished before January 20, 1967.[10] The report of August 8, a subsequent plant visit report by the industrial specialist dated August 24, 1966, and a letter from the ACO dated August 25, 1966, recommended a 60-day extension and/or a termination of the contract for the convenience of the Government because of failure to approve progress payments and the increase in lead time on the critical items. (Tr. 25, 54, 69-70; Exhs. N-5, N-9, N-10)

Because of the contracting officer's doubt as to whether the reasons cited in Emsco's letter of August 5 for failure to commence performance or make progress were excusable, he issued a 10-day show cause or cure letter on August 15, 1966, four days after amending the contract to authorize progress payments. (Exh. N-6) Before receipt of the show cause or cure letter, Emsco had sent a letter dated August 17, 1966, acknowledging receipt of the modification authorizing progress payments but stating that it was of "no help" as the lead time on materials had increased to 200 days or more. Emsco also requested a termination for convenience "at no penalty to the contractor". (Exh. N-7; Tr. 167) On August 23 Emsco answered the show cause or cure letter by asking for an extension of time to December 9 to commence performance because of the delay in approving progress payments or for a convenience termination but made no proposal or suggestion for curing its existing failure to make progress or otherwise indicating that it was ready, willing and able to perform.[11] (Exh. N-8; Tr. 168, 175) Because of Emsco's apparent lack of interest in committing itself to a revised delivery sched-

[10] The unit price on this item was $108,305, or 51.52% of the total contract price.

[11] In view of the assignment for the benefit of creditors made on October 20, 1966, we cannot find that on the date set for performance, or any claimed extension thereof for the Government's delay in authorizing progress payments, Emsco was ready, willing and able to perform. Compare *Mid-West Construction, Ltd.* v. *United States*, 181 Ct. Cl. 774, 789 (1967); *National Movers Co., Inc.* v. *United States*, 181 Ct. Cl. 419, 425 (1967).

ule, one that would take into account the necessity for an increase in lead time, because of its failure to place orders for even the shelf items during June, July, or August, and because of its statement that the authorization for progress payments was of "no help", the contracting officer concluded that Emsco's failure to make progress was endangering performance of the contract and that the Government's delay in approving progress payments did not justify extending until December 9 Emsco's time to commence performance. (Tr. 175-176)

For these reasons, and because of a continuing requirement for the contract items, the contracting officer determined to disregard the August 8 report from the ACO and the industrial specialist, as well as the report of the industrial specialist of August 24 and the ACO's letter of August 25 recommending a 60-day extension or termination of the contract for the convenience of the Government. (Tr. 167) Accordingly, on August 31, 1966, the contracting officer terminated the contract in its entirety for default, for failure to make progress so as to endanger performance. (Exh. N-11)

Evidence offered by the appellant-assignee relating to Emsco's unsuccessful efforts to obtain a $50,000 working capital loan from the Small Business Administration, during August 1966, shows (Tr. 32; Exhs. AA4-7), that at this time Emsco's debt to net worth ratio was 5.4 to 1. (Exh. AA-7a) It also shows that Emsco's application for a Small Business Administration loan was denied on August 26, 1966, five days before the termination for default, because of:

1. Lack of reasonable assurance the loan could be repaid from profits.
2. Lack of working capital after the loan. In this connection the Small Business Administration noted that "Considering that approximately $35,000.00 of the receivables are questionable as to collectibility, and the aging of the payables, the amount of this loan does not appear to be adequate, to be able to handle the volume of business projected. * * *" (Exh. AA-4b)
3. Unfavorable debt to net worth ratio. (Exhs. AA-4b, AA-6a)

The Small Business Administration found that Emsco's past operating record showed a trend toward increasingly heavy losses. Thus, on October 5, 1966, it noted that "Operations for 1963 resulted in a net loss of $21,-785, for 1964 a net loss of $95,997, for 1965 a net loss of $85,951, and for the current year to date, according to your latest Profit and Loss Statement submitted, a net loss of $54,561. We do not feel that the loan requested [which at this time, October 1966, was $100,000] would make enough improvement in your operations to reverse the operating losses you have sustained in the past." (Exh. AA-7a)

On October 20, 1966, Emsco made an assignment for the benefit of creditors. This was the date initial deliveries were due under the contract delivery schedule. On October 31, 1966, appellant-assignee's accountant furnished him with the results of a survey made to determine whether "the creditors would be better served by continuing the business or liquidating its assets." The accountant's conclusion was that "the best interests of the creditors would be served by releasing all personnel except productive shop employees, pending completion of the work in progress, particularly the Mid-Continent Supply Company order, and at that time to shut down completely and liquidate the assets in the most advantageous manner." (Exh. AA-3a)[12]

We find that at the time of termination Emsco was in fact financially incapable of performing the contract and that this incapacity had in fact endangered performance of the contract. We further find that the causes for Emsco's incapacity were not beyond its control and without its fault and negligence.

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[12] The assignee's accountant further reported that:

"The drop in sales from approximately $20,000 per month as shown on the 1965 Income Tax Return to approximately $9,000 per month in 1966, as reflected by the books is not explained. However, with the multiple interests of Mr. Johnson, it occurs to us that there is a possibility of diversion of Emsco Sales to some other interest."

3. *The Reprocurement*

The reprocurement was effected under formal advertising procedures, and the repurchase contract promptly awarded to the low bidder among the seven bids received from the sixty-eight sources solicited. (Tr. 182-183; Exhs. 18A-C) The award, made on November 23, 1966, went to the company that was the second low bidder on the original procurement. The repurchased items and their quantities were identical to those specified in the original contract. (Tr. 184-185) The delivery schedules under both the original and the repurchase contracts covered a 9-month period with a 4-month lead time. The total amount of the repurchase contract was $249,776.41. Excess costs as originally demanded totaled $40,398.66. (Exh. N-15) At the time of the hearing the Government had not accepted and paid for all of the repurchased items. For this reason, and by stipulation of the parties, the record was left open for receipt of evidence of actual payment of excess costs. (Tr. 187-190, 194-195) Compare the Board's action in *American Supply Co.*, ASBCA No. 13668, 69-1 BCA ¶ ——.

After the hearing the Board received in evidence in this matter repurchase vouchers 1 through 45 as Exhibit N-19, and the pleadings, where necessary, were deemed amended to conform to the proof. This evidence shows that the actual amount of the excess costs totaled $40,607.13.

We find that the repurchase was made within a reasonable time, that the repurchase price was obtained after reasonable competition, and that the price so obtained was reasonable. For this reason, we conclude and find that the Government has satisfied its duty to mitigate damages.

DECISION

The facts upon which our decision must turn show that primarily on the basis of assurances received from Emsco, and its banking reference, with respect to the availability of a commercial line of credit, but secondarily on the basis of a mistaken understanding of the viability

of Emsco's working capital position, the Government determined Emsco to be financially capable of performing the contract. When, subsequent to award, and for reasons now apparent, but not explained in the contemporaneous record, the commercial line of credit failed and the total inadequacy of Emsco's working capital position was disclosed, the contracting officer, after due notice, terminated the contract for failure to make progress. Shortly thereafter, Emsco made an assignment for the benefit of creditors and went out of business. Repurchase action was seasonably accomplished and demand made for the payment of approximately $41,000 in excess costs.

Appellant-assignee, as the substituted party in interest, vigorously asserts that because the Government should have known that Emsco was not financially responsible at the time of award, the award was invalid and Emsco's creditors are not liable for the consequences of the Government's error. Secondarily, it is claimed that the default for failure to make progress was premature since Emsco was entitled to an extension of time to commence performance due to the Government's delay in authorizing progress payments, or that in any event, this delay made timely performance physically impossible. The assignee also challenges the propriety of the repurchase action.

We find the default termination for progress failure was correct, and that in view of Emsco's unmistakable desire to avoid its obligation under the contract it would have been useless and vain to grant an extension of time for any delay by the Government in approving progress payments. We further find that Emsco's failure to insure adequate financial resources at the time of award was a risk of nonperformance it assumed in submitting its bid and that any mistake on the part of the Government in evaluating its financial capability neither invalidated the contract nor excused its failure to make progress so as to endanger performance of the contract. We also find that Emsco's inability to incur costs reimbursable under the progress payments clause was not due to any fault of the Government. For these reasons, we are unable to

find that the failure to authorize progress payments impaired Emsco's financial capability. Accordingly, we have no occasion to consider the applicability of the rule that mutual fault, *Vector Plastics Corporation*, ASBCA No. 9552, 65-2 BCA ¶ 5286, pp. 24,878-879; *Dynaelectron Corporation-Pacific Division*, ASBCA No. 11766, et al., 69-1 BCA ¶ 7595, p. 35,278, or an improper withholding of past due and current progress payments by the Government may excuse a default. *R. H. J. Corporation*, *supra*, Note 3; *United States* v. *Lennox Metal Manufacturing Co.*, 225 F. 2d 302 (2d Cir. 1955).

It is true, of course, that prior to award the contracting officer was required to find that the low, responsive bidder had adequate financial resources to perform the contract. *Lieco, Inc.*, ASBCA No. 13681, 69-1 BCA ¶ 7489; ASPR 1-902, 1-904.1, 1-905.2. We have always taken the position, however, that a good faith error on the part of the Government in making this determination is not an act of the Government in its contractual capacity that excuses nonperformance under clause (c) of the Default article. Compare, *Security Signals, Inc.*, ASBCA No. 4634, 58-2 BCA ¶ 2045, pp. 8590-8591, with *Southland Manufacturing Corporation*, ASBCA No. 10519, 67-1 BCA ¶ 6128, pp. 28,378-397; *American Canvas Products, Inc.*, ASBCA No. 10749, 66-1 BCA ¶ 5635, p. 26,317; *Valveair, Aircraft Division Abbotwares*, ASBCA No. 8322, 1964 BCA ¶ 4177, pp. 20,234-335, *reconsideration denied*, 1964 BCA ¶ 4509; *Polytronic Research, Inc.*, ASBCA No. 5918, 1962 BCA ¶ 3548, pp. 17,998-999; *Trand Plastics Company*, ASBCA No. 3708, 57-1 BCA ¶ 1186, pp. 3299-300; Speidel, *Financial Inability and the Default Termination of Defense Supply Contracts; A Small Business Case Study*, 44 Minn. L. Rev. 1055, 1060-66, 1085-90, 1094-95 (1960). With respect to the instant factual context, Speidel, *supra*, states, and we agree, that:

> "The Government's initial determination of 'responsibility' is not an act which will excuse a subsequent default, for a defective determination does not breach any contractual duty to the prospective contractor. The Government determines financial re-

> sponsibility prior to award in order to protect its own interest. Consequently, financial resources which were deemed adequate for a determination of responsibility may prove inadequate when the question of excusability arises; and the fact that the contract was awarded is not conclusive evidence of the contractor's financial ability to perform at the time of award. The contractor cannot rely upon a determination of financial responsibility, but must re-establish the fact of adequate financing in excusability proceedings before the ASBCA." Id. at 1089-1090.

This is not to say that under appropriate circumstances this Board may not find that the action of a contracting officer in determining the financial or other responsibility or responsiveness of a bidder so exceeded the regulatory and statutory limits of his authority or was so grossly erroneous as to invalidate the award. In a line of cases beginning with *John Reiner & Company* v. *United States*,[13] however, the Court of Claims, and also the Comptroller General,[14] have held that with respect to determinations of responsibility and responsiveness a contracting officer has authority, when acting in good faith and in a manner reasonable under the circumstances, to make a valid award to an otherwise unqualified bidder. *Mid-West Construction, Ltd.* v. *United States*, 181 Ct. Cl. 774, 782 (1967); *Otis Steel Products Corporation* v. *United States*, 161 Ct. Cl. 694, 699-700 (1963). Thus, the Court of Claims has specifically held that if a determination with respect to reliability and dependability is made in good faith and is reasonable under the applicable law and regulations, it should be upheld. *Warren Brothers Roads Company* v. *United States*, 173 Ct. Cl. 714, 720-721 (1965). See also *Coastal Cargo Company, Inc.* v. *United States*, 173 Ct. Cl. 259 (1965); *Brown & Son Electric Company* v. *United States*, 163 Ct. Cl. 465 (1963).

On the other hand, this Board and the Court of Claims have not hesitated to declare a contract invalid when

[13] 163 Ct. Cl. 381 (1963); *cert. denied*, 377 U.S. 931 (1964).

[14] 44 Comp. Gen. 221 (1964); 46 *id.* 275 (1966).

faced with clear and convincing evidence that no binding contract came into existence, or that in making the award the contracting officer exceeded his statutory authority or grossly disregarded procedures designed to preserve the integrity of the competitive bid system. *Ordnance Parts & Engineering Co.*, ASBCA No. 12820, 68-1 BCA ¶ 6870; *Prestex, Inc.*, ASBCA No. 6572, 61-1 BCA ¶ 2937; *Herbert Schoenbrod, As Trustees, Etc.* v. *United States*, Ct. Cl. No. 91-67, Slip Op. p. 8 (decided May 16, 1969). Compare, *ITT Defense Communications Division, Defense-Space Group*, ASBCA No. 13420, 69-1 BCA ¶ 7548.

But this is certainly not a case where interference with the broad discretion conferred upon the contracting officer to determine financial responsibility is warranted. On the contrary, the record clearly shows that it was Emsco's misrepresentations with respect to the imminent availability of a commercial line of credit and its failure to disclose the latent infirmities in its working capital structure that misled both the Government's financial analyst and the contracting officer to believe that Emsco possessed the financial capability necessary to perform the contract. Thus, it cannot be said that at the time of award the contracting officer abused his discretion in finding that Emsco had the apparent ability to perform the contract.

Turning to the propriety of the default termination and the excusable causes alleged, we find that the Government's two-month delay in authorizing progress payments was totally unrelated to Emsco's failure to make progress.[15] It is clear that because of Emsco's lack of working capital it was incapable of incurring the costs incident to its qualification for progress payments. Thus, even if they had been authorized, there is no reason to

[15] The Government concedes that Emsco's failure to indicate its need for progress payments in its bid did not disqualify it from receiving such authorization subsequent to award. ASPR, Appendix E-210.1.

believe that Emsco could have accrued on its books costs eligible for reimbursement.[16]

Furthermore, even if progress payments had been authorized and if Emsco had submitted a request for reimbursement for in-house engineering and other allocable costs, it seems clear, under Emsco's present admissions, that the contracting officer would have been justified in withholding payment under the Suspension of Payment provisions of the progress payments clause on the ground that Emsco's failure to make progress and unsatisfactory financial condition were endangering performance of the contract. Compare *Astrotherm Corporation*, ASBCA Nos. 8144, et al., 65-2 BCA ¶ 5248, at 24,722. For these reasons, we find no basis in fact or law for concluding that the Government's failure to authorize progress payments prior to August 11, 1966, in any way contributed to or impaired Emsco's financial ability to commence performance of the contract, or excused its failure to make appropriate progress toward performance of the contract. *Schutter Microwave Corp. (Isadore Cherno, Trustee in Bankruptcy)*, ASBCA No. 9786, 66-1 BCA ¶ 5473, at 25,648-649.

Because the termination was for failure to make progress, the Government had the burden of establishing that at the time of termination the contractor was in fact incapable of performing the contract. As to this, the facts show that after authorization of progress payments Emsco advised they were of "no help" and that in any event performance within the contract delivery schedule was impossible. Certainly, if the authorization of progress payments in August was of no help with respect to financing performance, and if, as Emsco stated and represented, it was caught in a cost-price squeeze on raw materials that would insure a loss on performance, and

[16] Progress payments are periodic advances of money to a contractor after he has commenced performance and incurred costs. ASPR Appendix E-106. Incurred costs are those identified through the accrual method of accounting and reporting. Invoices covering materials are considered to include incurred costs only to the extent that the materials have been delivered and paid for by the contractor. ASPR Appendix E-509.5, F-200.1195.

if, as the Government knew, Emsco had no working capital or other financial resources available to finance performance, there was no basis for any conclusion other than that Emsco's past failure to make progress was a prologue to a continuing incapacity of an increasingly serious character.

We have long and consistently held that a demonstrated likelihood of future inability to perform has the same consequences as an express repudiation and that either constitutes an anticipatory breach warranting termination for default under paragraph (a) (ii) of the Default article.[17] See, *Aircraftsmen Company, etc.*, ASBCA No. 3592, et al., 58-1 BCA ¶ 1667, at 6261-6262; *American Canvas Products, Inc.*, ASBCA No. 10749, 66-1 BCA ¶ 5635, at 26,317. Compare *James E. Kennedy, Trustee, et al.* v. *United States*, 164 Ct. Cl. 507, 513-514 (1964). See also Speidel, *Default for Failure to Make Progress, Government Contractor Briefing Paper*, 64-5, at 4-6 (October 1964).

Since it is well established that a failure to make progress brought on by a lack of working capital resulting from the unexplained failure of a bank to extend a line of credit is not excusable, *Security Signals, supra, Schutter Microwave Corp., supra*, little need be said as to the claimed impropriety of the default action on the ground that the advance in lead time on raw materials made performance in accordance with the original contract delivery schedule impossible. Our study of this record persuades us that Emsco could never have performed. The record also shows that before bidding and at the time of award Emsco had not made reasonable arrangements for financing performance of the contract through a commitment from a private financial institution, nor did

[17] The correctness of the judgment to terminate was confirmed when Emsco made its assignment for the benefit of creditors on the date initial deliveries were due under the contract. The evidence also shows that in August Emsco's working capital was insufficient to warrant a Small Business loan (Exh. AA-4a) and that by the end of September its liabilities exceeded its assets by approximately $120,000. (Exh. AA-3b) A contractor's breach of its implied obligation not to become financially incapable of performance is itself an anticipatory breach. *The Pennsylvania Exchange Bank, et al.* v. *United States*, 145 Ct. Cl. 216, 223 (1959).

it have adequate private resources, in the light of business custom and practice, to finance the commencement of performance or the incurrence of costs reimbursable under the progress payments clause. See *Washington Scientific Industries, Inc.*, ASBCA No. 9384, 65-1 BCA ¶ 4743, at 22,557. It is well settled that a financial weakness existing at the time of bid and award that results in endangering performance is not an excusable cause for failure to carry out the contract. *Office Equipment Company*, ASBCA No. 4648, 58-1 BCA ¶ 1717, at 6546; *R. P. Bennett Company, Inc.*, ASBCA No. 3738, 57-1 BCA ¶ 1262, at 3814-3815; Speidel, *supra*, 44 Minn. L. Rev. at 1078-1094.

And while supervening financial or other difficulties encountered after award that render performance "commercially senseless" (We are indebted for this phrase to the perceptive opinion by Judge Skelly Wright in *Transatlantic Financing Corporation* v. *United States*, 363 F.2d 312, 315 (D. C. Cir. 1966)), not merely more expensive, are excusable, we find that, as in the case of the Government's delay in authorizing progress payments, neither the increase in the price of steel nor the extension of the lead time on raw materials were the proximate cause of Emsco's *de facto* repudiation of the contract. Compare *Paromel Electronics Corporation*, ASBCA No. 4025, et al., 57-2 BCA ¶ 1503, reconsideration denied, 58-2 BCA ¶ 1839, with *Fabricated Products, Inc., et al.*, ASBCA No. 9631, 1964 BCA ¶ 4450, p. 21,418.

With respect to the propriety of the repurchase action, it is well settled that, since the Government has shown that reprocurement was effected with reasonable dispatch by the use of competitive formal advertising procedures, it satisfied its burden of showing it mitigated damages, *American Waterproofing Corporation*, ASBCA No. 922, April 28, 1953, p. 6; *Atlantic Fish & Oyster Co.* v. *United States*, 126 Ct. Cl. 892, 894 (1953), and shifted to appellant-assignee the burden of showing that the excess costs thus incurred could have otherwise been avoided. See, *James A. Connor, As Trustee Etc.*, ASBCA No. 10356, et al., 68-2 BCA ¶ 7409, p. 34,451. Appellant-assignee has failed to discharge this burden. Accordingly, we find that by the terms of the contract the Government is entitled to recover excess costs in the amount of $40,607.13.

For these reasons, both appeals are denied.

Dated 29 May 1969.

/s/ Joseph B. Kennedy, Jr.
JOSEPH B. KENNEDY, JR.
Member of Division No. 8,
Armed Services Board of
Contract Appeals

[Signatures continued]

I Concur

/s/ Rudolf Soberheim
RUDOLF SOBERHEIM
Member of Division No. 8,
Armed Services Board of
Contract Appeals

I Concur

/s/ Richard C. Solibekke,
RICHARD C. SOLIBEKKE,
Chairman,
Armed Services Board of
Contract Appeals and
Member of Division No. 8

I Concur

/s/ William J. Kelly
WILLIAM J. KELLY, Colonel,
USAF
Member of Division No. 8,
Armed Services Board of
Contract Appeals

I Concur

/s/ Joel P. Shedd
JOEL P. SHEDD,
Vice Chairman
Armed Services Board of
Contract Appeals and
Member of Division No. 8

I certify that the foregoing is a true copy of the decision and opinion by the Armed Services Board of Contract Appeals in ASBCA Nos. 11917 and 12184, appeals of Emsco Screen Pipe Company of Texas, Inc. (Thomas W. Moore, Jr., Assignee for the Benefit of Creditors), rendered in conformance with the Board's Charter.

Dated: 18 June 1967

GEORGE L. HAWKES, Recorder

/s/ George L. Hawkes
Armed Services Board of
Contract Appeals

LIST OF CREDITORS

NAME	AMOUNT OF CLAIM
Behring's Bearing Service, Inc.	$ 123.38
Brance-Krachy Co., Inc.	130.06
Briggs-Weaver	36.72
Burmass Publishing Co.	161.00
Carpenter Steel Company	3,490.78
Coulson, Edward	3,000.00
Dodge, F. W. Company	130.00
Decker Machine & Tool Co.	2,905.54
Dun & Bradstreet, Inc.	272.00
Frazer-Torbet	2,010.00
General Supply & Equipment Co.	139.20
Gerrard, A. J.	1,734.03
Goodwin & Carter, Inc.	308.13
Gulf Coast Oil Directory	65.00
Gulf Oil Corporation	268.16
Gulf Publishing Co.	972.00
Humble Oil & Refining Co.	501.93
Halliburton Co.	65.70
Houston Belt & Terminal Railway	82.50
Houston Power & Equipment Co.	86.60
Houston Saw & Knife Works, Inc.	26.22
Industrial Diamond Products Co.	47.54
Industrial Towel & Uniform Co.	265.79
Instant Reproduction Co.	129.89
Jacobe-Pearson Ford	6.08
Larkin Packer Division	1,889.33
Layne & Bowler Co.	888.50
Lipton Staple Co.	34.67
Magnolia Welding Supply Co.	240.51
Metal Goods Corporation	153.74
Norvell-Wilder Supply Co.	440.00
Paris, Henry H., Distributor, Inc.	812.32
Peden Iron & Steel Co.	1,597.49

NAME	AMOUNT OF CLAIM
Pipe Distributors, Inc.	145.22
Pincoffs, Maurice, Co.	586.57
Reader's Wholesale Distributors	109.65
Sam Reisfield & Son	79.66
Remington Office Machines	449.19
Republic Supply Co.	2,308.25
Rex Supply Corporation	17.78
Richardson's Rubber Stamp Works	156.01
Rothschild Pipe & Supply Corporation	309.12
A. P. Ruth & Co.	79.00
Joseph T. Ryerson & Son, Inc.	565.11
Skyvara Foundry	681.51
Southern Microfilm Corporation	141.54
Southwestern Steel Products Co.	36.14
Sunray DX Oil Co.	388.55
Texas Iron Works	1,598.10
Tube Sales	40.81
United Oilfield Supply Co.	4,356.02
University Press	161.32
Van Dusen Aircraft Supplies	33.59
Vinson, Elkins, Weems & Searls	2,210.24
Vinson Supply Co.	27,560.15
Walker-Kurth Lumber Co.	168.53
Wessendorff, Nelms & Co., Inc.	208.33
Western Well Screen Co.	1,270.79
Wilson Supply Company	1,488.68
Baxtul (Export) Limited	429.50
Century Papers, Inc.	72.64
TOTAL	$68,758.91

SUPREME COURT OF THE UNITED STATES

No. 74-687

UNITED STATES, PETITIONER

v.

THOMAS W. MOORE, JR., ETC., ET AL.

ORDER ALLOWING CERTIORARI—Filed February 18, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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Supreme Court, U. S.
FILED
JAN 13 1975
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NO. 74-687

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

UNITED STATES OF AMERICA, *Petitioner*

v.

THOMAS W. MOORE, JR., Assignee for Benefit of Creditors of Emsco Screen and Pipe Company, and Emsco Screen and Pipe Company of Texas, Inc.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court of the United States:

Now comes Thomas W. Moore, Jr., Assignee for Benefit of Creditors of Emsco Screen Pipe Company of Texas, Inc., the Respondent herein, and files this Reply to the Petition for Writ of Certiorari.

PRELIMINARY STATEMENT

The Petitioner has accurately related the opinions below, the jurisdictional grounds, the question presented, and the statement of the case. In brief, this case involves the

Government's claim of priority to the proceeds of the insolvency of Emsco Screen Pipe Company of Texas, Inc. On October 20, 1966, the date of the insolvency, none of the Government's claims were liquidated as to amount.

REASONS FOR DENYING THE WRIT, AND ARGUMENT

The Court of Appeals below correctly held that claims unliquidated at the time of insolvency are not "debts due" within the meaning of the priority statutes.

This case involves the interpretation of the term "debts due" within the insolvency-priority statutes. The governing statute reads in relevant part as follows: "Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied." 31 U.S.C. § 191. The statute has been carried forward substantially unchanged in wording since its passage in 1797. Two Supreme Court cases have dealt with the matter indirectly, but the two cases are inconsistent. One of the Supreme Court cases suggests that an unliquidated claim is not included in the term "debt due". *Massachusetts, et al v. United States*, 333 U.S. 611, 68 S.Ct. 747, 755-757 (1948). The other Supreme Court case did not focus on the question of whether an unliquidated claim was a "debt due", but the Court assumed that priority applied, without discussion, even though the claim was liquidated. *King v. United States*, 379 U.S. 329 (1964).

A. "Debts Due", As Interpreted by Massachusetts v. United States, 331 U.S. 611 (1948).

In *Massachusetts*, an assignee for benefit of creditors paid state unemployment taxes rather than Federal in-

surance contribution taxes. The state argued that the assignee was entitled to do so because of provisions in the Federal law allowing credit for monies paid to approve state unemployment funds. The Court held that the right to pay the state taxes and take credit for them was cut off by the insolvency, which gave rise to the priority statute. It reasoned that the priority of the United States was absolute and was not conditional, once insolvency had arisen. The Court reasoned further that applying credits to the Federal tax for the state tax, as urged by the Commonwealth of Massachusetts, would take the priority statute beyond the term "debts due to the United States" because it would establish a contingency at the time of the insolvency. The language on which the Assignee relies in this case is as follows:

> "A further effect might be to make the statute applicable beyond the scope of the term 'debts due to the United States'. For if the taxpayer's subsequent election can destroy the priority retroactively, not only the priority but the 'debt' itself becomes contingent. *And it is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of 'debts due' as of the time of insolvency.*" (emphasis added) 68 S.Ct. at 756.

It is clear that the priority statute is detrimental to other creditors of the debtor. In the instant case, for example, 62 other creditors of Emsco will receive nothing on their claims if priority applies. Because of the harshness on other creditors, priority should only be accorded in the instances in which the statute clearly applies, such as in taxes and other liquidated debts.

The Assignee asserts that the term "debt due" does not include contingent, unliquidated damages. Numerous authorities indicate that the term "debt" in a legal sense, refers to a liquidated claim or a sum certain. See 26 C.J.S. "Debt", Page 5 and 6. *Massachusetts* itself pointed out in a footnote that in the long history of the statute that all the decisions sustaining the priority were for debts clearly due and owing and that Congress *"drew the line for its operation close to, if not at, the commonly accepted meaning of 'debt' as distinguished from other forms of obligation."* 68 S.Ct. at 756. A leading case interpreting the statute held that taxes were within the term "debt due". *Price v. United States*, 269 U.S. 492, 46 S.Ct. 180, 181 (1926). In its opinion, the Court gave strong support to the contention that "debts" mean liquidated claims by stating that "an action of *debt* lies to recover taxes where *the amount due is certain or readily may be made certain.*" 46 S.Ct. at 181. See also *Legett v. Southeastern Peoples College,* 68 S.E.2d 263, 267 (North Carolina, 1951) in which the court stated that "a debt due is a debt accrued, and a debt is accrued when all events have occurred which fix and determine the liability of the debtor to the creditor." In the instant case, the claims of the United States were unliquidated as of the time of the insolvency, and accordingly were not present debts within the contemplation of the statute.

Perhaps the most authoritative interpretation of the term "debt due" in the priority statute is found in an 1832 case by this Court in which the Court held that a bond in favor of the United States was a "debt" within the statute even though the maturity of the bond was after the insolvency. *United States v. The State Bank of North Carolina,* 6 Pet. 29 (1832). In the opinion, Justice Story

indicated that the term was used in a common sense and was to be interpreted in the sense of the common law maxim: *debitum in presenti, solvendum in futuro.* 6 Pet. at 39. Translated, the phrase means a present debt, payable in the future.

In the common law usage, the phrase refers to an ascertained sum of money that was certainly and in all events payable at some time in the future. Examples of this type of obligation would be promissory notes and bonds. The type of obligation would be a sum certain or readily made certain by mathematical computation. The common law usage of the term did not include obligations wholly contingent for ultimate maturity and obligation upon the happening of later events, as opposed to the mere passage of time. *See Baltimore City v. Rice,* 50 Md. 302, 316 (Md., 1879); *People v. Arguello,* 37 Cal. 524, 525 (Cal. 1969); *Bank of Pennsylvania v. Wise,* 3 Watts 394, 401-403 (Pa., 1834); *Wood v. Partridge,* 11 Mass. 488, 493 (Mass., 1814); *Davis et al. v. Samuel Ham et al.,* 3 Mass. 33, 37 (Mass., 1807); *Wentworth v. Whittemore,* 1 Mass. 471, 472-473 (Mass., 1805).

For example, in one of the foregoing authorities, the court held that the potential wages of a sailor were not subject to attachment in accordance with the statutory terms, because they were not really "debts" until the ship had landed, which was a later event, a contingency. *Wentworth v. Whittemore,* 1 Mass. 471, 472-473 (Mass., 1805). In the instant case, at the time of the Assignment for Benefit of Creditors, the damages owed by Emsco to the United States were wholly contingent for ultimate maturity upon the happening of later events and not the mere passage of time. There had to be a repurchase and re-letting of the contract to liquidate damages. As of the

date of the insolvency, it was possible there would be no damages or that Emsco would be excused from performance. One could not ascertain the prospective obligation by mathematical calculation, as in the case of a promissory note or a bond. There was no "debt" to which the United States was entitled to prior payment to the detriment of other creditors.

The majority and concurring opinions of the Court of Appeals properly looked to the common law for guidance in interpreting the term "debt due". Both opinions correctly focused on the question whether the amount of the obligation was certain or readily ascertainable at the time of insolvency. To that extent, the Court of Appeals decision is consistent with the interpretation of the term "debts due" by the Supreme Court in *Massachusetts* and *State Bank*. Certain language in the majority opinion below is too broad because it would require that the obligation be presently payable at the time of insolvency, but that unfortunate language should not detract from the court's proper insistence that a "debt" within the statute must be a liquidated claim, in the sense of a certain sum or a sum readily ascertainable by mathematical computation. The addition of the "mathematical computation" requirement allows the inclusion of debts payable after insolvency, such as promissory notes, bonds, etc. within the common law maximum, *debitum in presenti, solvendum in futuro,* in accordance with the *State Bank* decision.

From the foregoing authorities, it seems clear that the term "debts due", as used in the priority statutes and as interpreted by Justice Story in the *State Bank* decision, was used in the common law sense of liquidated damages. Had the legislature intended to include torts, unliquidated damages, or other types of obligations, it would have used

broader language such as "claims". It is a fair assumption that broader words were not used because of the harsh affecton other creditors of the insolvent.

B. Analysis of the Petition for Writ of Certiorari

The Government urges strongly that the priority statutes should be construed liberally to protect the Government's purse, particularly in bankruptcy cases. The Court should not, however, go beyond the plain meaning of the words "debts due" as intended by Congress. As indicated in the *State Bank* case, the statute ought to receive a fair and reasonable interpretation, in accordance with the just import of its terms. 6 Pet. at 33. The meaning of the term "debt", and the early cases heretofore cited, indicate thtat the framers of the legislation probably intended the term "debt due" as some type of liquidated, present debt. *Massachusetts v. United States,* supra, 68 S.Ct. at page 756; *The United States v. The State Bank of Carolina,* 6 Pet. 29, 39 (1832).

The argument of protecting the Government's purse has its strongest application in connection with tax revenues, which was one of the original purposes of the Act. *Price v. United States, supra,* 46 S.Ct. at 181. Taxes are "debts due" because they are reasonably liquidated claims; the amount due is certain or readily may be made certain. *Id.,* 46 S.Ct. at 181. Liquidation does not depend on events subsequent to the time in question, as in the instant case. Tax revenues are a revenue source that can be reasonably anticipated in the federal budget. In the instant case, the United States is not actually out any money because of the failure of Emsco because the contracts were relet at proper bids. It is doubtful that the fiscal policy of the United States depends to any sub-

stantial degree on damages gleaned from business failures of companies lacking business. While it is true that government claims on contract defaults may be affected by the instant case, the more significant Government tax claims should be relatively unaffected.

Claims involving contract defaults may result in prorata distribution to the Government instead of priority distributions, if the Government does not diligently liquidate its claims. Such a result is not unfair if one considers the significant adverse impact of the priority statutes on suppliers and other creditors of the insolvent, many of whom perhaps extended credit on the strength of the government contract. The instant case is an appropriate example of the consequences to other creditors. Emsco's other creditors, who were dealing with Emsco on a businesss basis, just as the United States was dealing with Emsco, will receive nothing on their claims if priority is granted to the Government.

It is important to distinguish between *recognition* of the Government's claims and *priority* of such claims. Certainly the Government's claims should be recognized in the instant case, though they were unliquidated at the time of the insolvency. Even wholly contingent are recognizable in bankruptcy. 11 U.S.C. §103 (a) (8) (9). But to say a claim is recognizable does not mean it necessarily should be entitled to a priority over other similarily recognizable claims. In State Bank, supra, Justice Story argued by analogy to decedents' estates that unmatured *debts* were entitled to priority because such *debts* were recognizable in the probate of estates. 6 Pet. at 37. The Government in its petition at page 9 has sought to extend that analogy by the citation of cases dealing with the recognition of unliquidated *claims*. The Government neglected the remaining portion of *State Bank* where Justice Story stated that the term "debts due" was to be understood by reference to the common law maxim, *debitum in presenti, solvendum in futuro,* which has been analyzed in the foregoing portions of this brief to indicate a definite, ascertained sum, payable in the future.

The limited cases in which unliquidated claims were held to be "debts due" are not binding on this case. In the case of *United States v. Barnes,* 31 Fed. 705, 707 (C.C.S.D.N.Y., 1887), the court cited no authority for its proposition that the priority statute applied to unliquidated claims, because there was none. In the case of *United States v. National Sur. Co.,* 254 U.S. 73 (1920), the opinion does not state whether the claim was liquidated or not at the date of insolvency, and there was no discussion of the issue. In the case of *United States v. King,* 379 U.S. 329 (1964), the claims were unliquidated at the time of insolvency, but the issue whether such claims were "debts" within the statute was not analyzed and apparently was not argued.

The government has attempted to minimize and distinguish the critical language found in *Massachusetts v. United States,* 333 U.S. 611, 626-627, 68 S.Ct. at 756 (1948). As noted previously, there, there Court stated that it was at least doubtful that obligations "wholly contingent for *ultimate maturity* and obligation upon the *happening of events after insolvency*" were "debts due" within the meaning and contemplation of the statute. 333 U.S. at 626-627, 68 S.Ct. at 756 (emphasis added). The Government argues at page 9 of its petition that *liability* in the instant case was not dependent on post-insolvency events. Surely such an argument does not equate the present case to that of a promissory note or a bond with a

post-insolvency maturity. Here ultimate maturity and obligation depended on more than the mere passage of time. It depended on reprocurring the contract to liquidate damages, a post-insolvency event or contingency that takes this case beyond the term "debt due", within the contemplation of the statute.

CONCLUSION AND PRAYER

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS OSA HARRIS
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Attorney for Respondent

CERTIFICATE OF SERVICE

Service was posted on opposing counsel by certified mail this 13th day of January, 1975.

THOMAS OSA HARRIS

Supreme Court, U. S.
FILED
MAY 6 1975

No. 74-687

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN AND PIPE COMPANY, AND EMSCO SCREEN AND PIPE COMPANY OF TEXAS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 15–24) is reported at 497 F. 2d 976. The order of the district court (Pet. App. C 27–30) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B 25–26) was entered on July 26, 1974. By orders dated October 16 and November 18, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari until December 9, 1974. The petition was

filed on December 2, 1974, and was granted on February 18, 1975 (A. 70). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an indebtedness to the United States arising from an insolvent government contractor's default occurring prior to its assignment for the benefit of creditors is disentitled to the statutory priority for "debts due to the United States" solely because the amount owing was not finally ascertained at the time of the assignment.

STATUTES INVOLVED

Section 5 of the Act of March 3, 1797, 1 Stat. 515, 31 U.S.C. 191 (Section 3466 of the Revised Statutes), provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Section 65 of the Act of March 2, 1799, 1 Stat. 676, as amended, 31 U.S.C. 192 (Section 3467 of the Revised Statutes), provides:

> Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

STATEMENT

The facts are undisputed and are summarized in the court of appeals' opinion (Pet. App. A 15–16).[1] In June 1966, respondent Emsco Screen and Pipe Company of Texas, Inc., entered into three government contracts. In one Emsco undertook to supply shield assemblies to the Navy for a contract price of $210,231 with deliveries to commence October 20, 1966, and to be completed by June 1967. In the second Emsco undertook to deliver curb deck assemblies to the Army by December 5, 1966, for a contract price of $27,428. In the third Emsco undertook to supply pallets to the Defense Supply Agency ("DSA") to be delivered by August 25, 1966, for a contract price of $72,637.

On August 5, 1966, Emsco gave notice that the Navy contract would be "impossible to perform" unless the Navy made progress payments not then called for

[1] The facts are set forth in detail in a stipulation of the parties (A. 32–42) and the opinion of the Armed Services Board of Contract Appeals (Nos. 11917, 12184), dated May 29, 1969, disposing of Emsco's claim concerning one of the contracts involved here (A. 43–67).

by the contract.[2] The Navy treated Emsco's letter as a repudiation and abandonment of the contract and formally terminated the contract on August 31, 1966. Emsco also repudiated the Army contract in August 1966 and did not deliver as required. The Army notified Emsco on August 21, 1966, that it intended to treat the contract as terminated. Finally, because Emsco had not delivered, DSA terminated its contract on October 19, 1966.

On October 20, 1966, Emsco made a voluntary assignment of its assets to respondent Thomas W. Moore, Jr., as assignee for the benefit of its creditors.[3] Emsco then had $55,707.28 in assets and, in addition to its debts to the United States involved in this case, owed nearly $6,000 to the City of Houston (see A. 41) and $68,759 to 61 private creditors (A. 68–69). Emsco stipulated that it had insufficient assets to satisfy all of its creditor obligations (A. 34), and, in

[2] A full statement of the difficulties involved with the progress payments and Emsco's failure to deliver under the Navy contract is found in the opinion of the Armed Services Board of Contract Appeals (A. 43–67).

[3] Texas, like most states, has a statutory procedure under which a debtor may obtain an adjustment of its liabilities by making an assignment for the benefit of creditors. Texas Code Ann., Bus. & Comm. §§ 23.01, *et seq.* (1968). In addition, Texas continues to recognize the validity of common law assignments for the benefit of creditors (see p. 10, *infra*, n. 7) in cases not covered by or not satisfying the requirements of the statutory provisions. See, *e.g.*, *Johnson* v. *Robinson*, 68 Tex. 399, 4 S.W. 625; *Haijek & Simecek* v. *Luck*, 96 Tex. 517, 74 S.W. 305; *J. M. Radford Grocery Co.* v. *Ewing*, 66 S.W. 2d 344, 345 (Tex. Ct. Civ. App.); *In re Freeman*, 35 F. 2d 952, 953 (C.A. 5). Emsco apparently made a common law assignment rather than an assignment pursuant to the Texas statute.

fact, the claims of the 61 private creditors—all of whom consented to the assignment—were themselves greater than Emsco's assets.

The United States did not consent to the assignment. Rather, it submitted to the assignee proofs of claims covering Emsco's debts to the United States for its defaults under the three contracts. The amount of Emsco's liability under the Navy contract was determined when the Navy, in November 1966, let a new contract at a higher price, resulting in excess costs of $40,607 (excluding interest), for which amount Emsco is admittedly indebted to the United States (A. 32). The Army formalized termination of its repudiated contract with Emsco on December 6, 1966, and let a new contract at a higher price in June 1967, with damages of $4,272 having accrued (A. 32–33, 37), although the government and the assignee subsequently agreed upon $5,000 as the amount of Emsco's debt to the United States under that contract (A. 33, 39). DSA also let a new contract at a higher price in January 1967, resulting in excess costs of $8,436, and DSA and the assignee have agreed on $6,073 (excluding interest) as the amount of Emsco's debt to the United States under that contract (A. 33).

The respondent assignee refused the government's request that he pay Emsco's debts to the United States arising out of Emsco's defaults on the three contracts (A. 22, 24, 26). Therefore, in February 1972 the United States filed suit in the United States District Court for the Southern District of Texas against the assignee and Emsco claiming priority under 31 U.S.C.

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191 and 192 for the debts due to the United States under the Navy, Army, and DSA contracts, totalling $67,313.70 (not including interest). The district court held that the United States had priority for its three claims under 31 U.S.C. 191 and 192 (Pet. App. C 27–30).

The court of appeals reversed, one judge dissenting. Relying upon the technical requirements for a common law action for debt in the 1790's, the court held that because the claims "were not for fixed and certain amounts and presently payable" at the time of the voluntary assignment they were not entitled to the United States' priority under Sections 191 and 192 (Pet. App. A 17). Judge Coleman concurred in a separate opinion, on the ground that the United States was not entitled to priority on its claims because the amount of damages had been ascertained prior to the assignment by an authority having jurisdiction to bind both parties to the contract (*id.* at 19).

In his dissent, Judge Thornberry noted cases granting priority to the United States for claims wholly unliquidated at the critical date[4] and relied on the principle that Sections 191 and 192 are to be liberally construed to protect government funds (*id.* at 20, 22–23).[5] He also suggested that analogous definitions in the Bankruptcy Act for debts and unliquidated claims (11 U.S.C. 93(d) and 103(a)(8)) should apply in this context, and concluded that the majority's narrow construction of "debts" defeats the pur-

[4] *King* v. *United States*, 379 U.S. 329; *United States* v. *Barnes*, 31 F. 705 (C.C. S.D. N.Y.).

[5] *E.g.*, *Small Business Administration* v. *McClellan*, 364 U.S. 446, 451–452; *United States* v. *State Bank*, 6 Pet. 29, 35.

pose of protecting government revenues (*id.* at 22, 23–24). He would have held that a "debt due" under Sections 191 and 192 includes an obligation unliquidated at the time of insolvency "so long as the claim can be liquidated or estimated * * * within a reasonable time so as to avoid undue delay in distributing the debtor's assets to the creditors" (*id.* at 24).

SUMMARY OF ARGUMENT

The court of appeals held that the statutory priority accorded "debts due" to the United States applies only to "presently payable" debts "for fixed and certain amounts" such as might be recoverable in a common law action for debt (Pet. App. A 17), and hence is inapplicable to the government's claim for damages resulting from an insolvent debtor's breach of contract where the amount of the liability was not established until after the debtor made an assignment for the benefit of creditors. The court of appeals has given the priority statutes an unwarrantedly narrow construction contrary to their language, purpose and settled interpretation.

This Court has repeatedly held that the priority statutes are to be "liberally" construed in the government's favor and that the term "debts due" is not to be confined by any technical meaning. *E.g.*, *Price* v. *United States*, 269 U.S. 492, 500. More specifically, the Court has interpreted the statutes as applying without regard to whether the claim in issue was recoverable in an action for debt and even if the debt is not "presently payable" or certain in amount at the critical date.

The court of appeals erred in relying on antiquated pleading rules in construing the priority statutes, rather than considering the substantive principles developed concerning such related matters as bankruptcy and other proceedings involving debtors' estates. In those areas a claim based on a breach of contract would ordinarily be entitled to payment even if the debtor's liability was in some sense contingent or was uncertain in amount on the critical date. Respondents concede, for example, that the government's claims here would be provable debts entitled to share in the debtor's assets if there had been a bankruptcy proceeding (Reply to Pet. 8).

Implicit in the court of appeals' decision is a distinction among different types of debts due to the United States under which only some—those presently payable for which an action for debt might have been brought—are entitled to priority. But such a distinction among debts has no justification and was rejected by this Court nearly 150 years ago. See *United States* v. *State Bank*, 6 Pet. 29, 38. It would, moreover, provide a risky and unworkable standard for persons administering debtors' estates in determining whether payments to other creditors could safely be made, and might foster unnecessary litigation.

The court of appeals' interpretation of the priority statutes also has the undesirable consequence of providing a means for a debtor and its private creditors to circumvent the federal priority by resorting to a voluntary assignment for the benefit of creditors rather than bankruptcy proceedings in which the government's debt would be entitled to priority, leaving the government without recourse.

ARGUMENT

A GOVERNMENT CONTRACTOR'S LIABILITY FOR DAMAGES CAUSED BY ITS DEFAULT IS A "DEBT DUE" TO THE UNITED STATES UNDER THE FEDERAL PRIORITY STATUTES EVEN IF IT IS UNLIQUIDATED AND UNCERTAIN IN AMOUNT

A. THE LANGUAGE AND HISTORY OF THE PRIORITY STATUTES DO NOT SUPPORT LIMITATION OF THE PRIORITY TO CLAIMS FOR FIXED AMOUNTS PRESENTLY PAYABLE

The court of appeals' holding—that the federal priority statutes (Sections 3466 and 3467 of the Revised Statutes, 31 U.S.C. 191–192) are limited to claims of the United States that are "for fixed and certain amounts and presently payable" at the critical date and that could be recovered in a common law action for debt—is not supported by the language of the statutes, their purpose, or their history.

1. *The language and structure of the federal priority statutes*

The federal priority originated in the Act of July 31, 1789, 1 Stat. 29, which concerned debts to the United States based on importers' bonds posted in lieu of immediate payment of import duties. As in successor enactments, this statute provided that the "debt due to the United States" shall be satisfied first "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased * * *." Sec. 21, 1 Stat. 42. This provision was

reenacted *in haec verba* in 1970 (Sec. 45, 1 Stat. 169), and was broadened by a 1792 enactment specifying that "the cases of insolvency" referred to[6] should be deemed to extend "to cases in which a debtor, not having sufficient property to pay all his or her debts," makes a voluntary assignment for the benefit of creditors,[7] or in which the estate and effects of an absconding, concealed or absent debtor have been attached by process of law, or an act of legal bankruptcy has been committed.[8] 1 Stat. 263.

The broad scope of the present priority statutes derives from the Act of March 3, 1797, 1 Stat. 512, Section 5 of which provided that (1 Stat. 515):

[6] Although the 1792 statute referred to "the cases of insolvency" specified in the forty-fourth section of the 1790 statute, the only relevant mention of insolvency was in Section 45, which provided for the federal priority.

[7] An assignment for the benefit of creditors has been recognized as a debtor's remedy in this country since the eighteenth century. Cf. *Grover* v. *Wakeman*, 11 Wend. 187, 216 (N.Y. Ct. Corr. Err.) (Tracy, Sen., concurring); *Dunham* v. *Waterman*, 17 N.Y. 9, 15. Originally a matter of common law, such assignments eventually were supplemented or regulated by a variety of statutory provisions. See Burrill, *Voluntary Assignments* 10–28 (2d ed. 1858); Bishop, *Insolvent Debtors* 5–13, 116–117 (3d ed. 1895). See generally *Brashear* v. *West*, 7 Pet. 608, 614; *Reed* v. *McIntyre*, 98 U.S. 507, 509–511; *Halsey* v. *Whitney*, 4 Mason 206, 210 (C.C. Mass.) (Story, J.). In general, a common law assignment may provide that some or all of a debtor's assets be applied by the assignee to pay some or all creditors to the extent and in the order specified in the assignment. The assignment may also provide that payment thereunder will satisfy the debtor's obligations to creditors consenting to it. Burrill, *supra*, at 156–178, 583–588.

[8] A federal bankruptcy law was not enacted until 1800 (2 Stat. 36), and the statute contemplated acts of legal bankruptcy pursuant to state law as well as federal law.

> where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed.

Prior to 1799, the federal priority was subject to essentially voluntary enforcement by persons administering the estates of insolvent or deceased debtors, as there were no sanctions for disregarding the priority, nor any federal bankruptcy laws under which a court might enforce the priority. This deficiency was cured by the Act of March 2, 1799, 1 Stat. 627, Section 65 of which provided, *inter alia,* that (1 Stat. 676):

> in all cases of insolvency, or where any estate in the hands of the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting,

> previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof * * *.[9]

The personal liability established by Section 65 has supplied a particularly important means for enforcing the priority for debts due to the United States not only during periods when there have been no federal bankruptcy laws[10] but also when an insolvent debtor's estate is administered outside of the bankruptcy laws, as in the instant case.

Federal bankruptcy laws, however, either directly or by reference to the priority statutes, have long provided some measure of priority for "debts" due to the United States.[11] Presently, "debts other than for taxes owing to any person, including the United States, who by the laws of the United States is entitled to priority * * *" are included in the fifth priority given

[9] Section 65 further provided that the "cases of insolvency" referred to included the same situations specified in the 1792 statute (see p. 10, *supra*).

[10] During the periods 1789 to 1800, 1803 to 1841, 1843 to 1867, and 1878 to 1898 there was no federal bankruptcy law in effect. See 1 Collier, *Bankruptcy* ¶¶ 0.04–0.06 (Moore & King 14th ed. 1974).

[11] See, *e.g.*, 2 Stat. 36; 5 Stat. 444; 14 Stat. 531. See also 3A Collier, *supra*, at ¶ 64.501 [2.1] (1972).

by Section 64 of the Bankruptcy Act, as amended, following costs of administration, wages of employees, taxes owing by the bankrupt to the United States or to a state, and preceding all other debts to unsecured creditors. 11 U.S.C. 104(a). See also 11 U.S.C. 502, 1059(6).

In the Revised Statutes of the United States, the general federal priority established in 1797 and the personal liability established in 1799 were codified as Section 3466 and 3467, now 31 U.S.C. 191 and 192, respectively. It is now well—established that these provisions "are part of a single statutory structure" and "must be interpreted *in pari materia*." *King* v. *United States*, 379 U.S. 329, 334, 336.

2. *The history and purpose of the federal priority statutes.*

Although the purpose and proper scope of the federal priority statutes are not illuminated by the usual sources of legislative history,[12] they are not without relevant historical background. At common law the Crown had the sovereign prerogative of having its debts paid in preference to those of other creditors. 1 Clark, *Receivers* § 699, at 948 (2d ed. 1929). Although the priority of the federal government has been held to rest solely upon the statutes, and not upon the common law prerogative (*e.g.*, *United States* v. *State Bank*, 6 Pet. 29, 35), many states determined that they had a common law priority similar to the Crown's. For example, in 1793 the Maryland General Court held the state entitled to priority at common law for a simple contract debt. *Murray* v. *Ridley*, 3 Harr. &

[12] See, *e.g.*, Annals of Cong. 1549, 1551, 1563, 1569, 1571, 1575, 1576, 2079, 2161 2162 (1849); 8 *id.* at 2216–2221 (1851); 9 *id.* at 2815 2821, 2857 (1851).

McH. 171, 175. See generally *Marshall* v. *New York*, 254 U.S. 380, 382–383; Annotation, 51 A.L.R. 1355 (1927).

While not resting on the same legal basis as the Crown's priority, the federal priority was intended to serve the same public policy of assuring that, in order "to sustain the public burdens, and discharge the public debts," the government's flow of revenues not be diminished by the insolvency of those who owe it money (*United States* v. *State Bank, supra,* 6 Pet. at 35), and the priority statutes are to be liberally constructed to that end. See *United States* v. *Key,* 397 U.S. 322, 324.

In terms of that policy, there is no basis for distinguishing between debts due to the United States that are liquidated in amount and those that have not yet been liquidated. The priority statutes are designed to insure that the government's debts are paid first out of insolvent debtors' estates, and that objective requires that all of those debts, not just those whose amount has been fixed at the time of an assignment, obtain the priority. If the government's claim is sufficiently fixed and ascertainable to entitle the government to payment from the debtor's estate—as respondents concede is so here (Reply to Pet. 8)—it is entitled to priority as well.[13] The government's need for the revenues due

[13] If Emsco had claims against the United States, its debts for breach of the contracts could have been offset against such claims pursuant to the long-standing practice, endorsed by Congress and this Court, in which the government may set-off against its obligations to a contractor the latter's debts due to the United States, including disputed liabilities for breach of contract not finally ascertained in amount. See, *e.g.*, 31

from its debtors is unrelated to the degree of certainty, at an arbitrary date often reflecting merely the choice of the debtor or of other creditors (see p. 17, *supra,* n. 15), about the precise amount ultimately owing.

Justice Story observed in *United States* v. *State Bank, supra,* with particular reference to bonds given by debtors who had died or had made assignments for the benefit of creditors (6 Pet. at 38):

> No reason can be perceived, why, in cases of a deficiency of assets of deceased persons, the legislature should make a distinction between bonds which should be payable at the time of their decease, and bonds which should become payable afterwards. The same public policy, which would secure a priority of payment to the United States, in one case, applies with equal force to the other; and an omission to provide for such priority in regard to bonds, payable *in futuro,* would amount to an abandonment of all claims, except for a *pro rata* dividend. In cases of general assignments by debtors, there would be a still stronger reason against making a distinction between bonds then payable and bonds payable *in futuro;* for the debtor might, at his option, give any preferences to other creditors, and postpone the debts of the United States, of the latter description, and even exclude them altogether. In the case before the court, the assignment expressly postpones the claims of the United States in favor

U.S.C. 227; *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239–240; 4 Ops. Att'y Gen. 380 (1845).

> of mere private creditors. It would be difficult to assign any sufficient motive for the legislature to allow the public debtors to avail themselves of such an injurious option. * * * [14]

B. THE PRINCIPLE THE COURT OF APPEALS ANNOUNCED PERMITS A DEBTOR TO CIRCUMVENT THE FEDERAL PRIORITY AND GIVE PREFERENTIAL TREATMENT TO PRIVATE CREDITORS

As we have noted (see pp. 12–13, *supra*) the Bankruptcy Act accords priority to debts owing to the United States that are entitled to priority under federal law. 11 U.S.C. 104(a)(5). If bankruptcy proceedings against Emsco had been instituted, the claims in issue here would not only have been provable debts but would have been entitled to priority (see pp. 26–27, *infra*). The decision whether such proceedings should be instituted, however, is effectively in the hands of the debtor, who may at any time file a petition to be

[14] A distinction among debts entitled to priority is not necessary to facilitate the administration of the debtor's estate, because the person responsible can simply set aside sufficient assets to cover the government's claims. Cf. *United States* v. *Barnes*, 31 F. 705, 709 (C.C. S.D. N.Y.). Nor is such a distinction justified by concern about delay in administering the estate. Under the Bankruptcy Act, as noted below (p. 26, *infra*), a contingent claim is not provable if to do so would unduly delay the proceedings. With respect to defense contracts, moreover, contracting officers are obliged to ascertain "promptly" the amount of all indebtedness to the government. 32 C.F.R. 163.101(b). Where the supplies or services covered by a defaulted contract are still required after termination of the contract, "repurchase * * * shall be made against the contractor's account as soon as practicable after termination." 32 C.F.R. 8.602–6(a). There is no basis for claiming here—and the court of appeals did not hold—that the government did not "diligently liquidate its claims" (Reply to Pet. 8).

adjudged a voluntary bankrupt (11 U.S.C. 95(a)), or of creditors other than the United States, because the United States cannot itself institute bankruptcy proceedings.[15]

Under the decision of the court of appeals, however, the government's claim was denied priority simply because Emsco and its creditors chose to forego bankruptcy proceedings in favor of an assignment for the benefit of creditors made after Emsco became liable to the United States for breach of contract but before the United States had had an opportunity to fix the amount of that liability by repurchasing the supplies in question. The decision thus offers a means for, and incentive to, the government's contract debtors and their private creditors to avoid the effect of the federal priority statute, which often reduces the amount that unsecured creditors recover from insolvent debtors.[16] A debtor might well be inclined to take that course to curry favor with its creditors, with whom it may wish to deal further.

[15] If twelve or more creditors have claims, an involuntary bankruptcy petition may be filed only by three or more creditors having provable liquidated claims, not contingent as to liability, amounting in the aggregate to $500 in excess of the value of any securities held by them. 11 U.S.C. 95(b).

[16] In the instant case, for example, if the government's claims have priority the other creditors will take nothing, whereas if there is no priority they will receive substantial portions of their debts and the United States will receive nothing (see pp. 4–5, *supra*). We note in this connection that, in view of the higher prices when the contracts were relet, it is not accurate to say that "the United States is not actually out any money because of" Emsco's default (Reply to Pet. 7).

The effect of the decision, moreover, is not necessarily confined to the situation presented in the instant case where the United States was entitled to "cover" the contractor's default by repurchasing. A contractor's indebtedness to the government can arise in various ways,[17] many of which claims would not be liquidated or certain in amount until some time had passed or further action had been taken. Such an undermining of the scope of the federal priority statutes is contrary to the long-established principles concerning their public purpose and broad scope.

[17] Defense Department regulations concerning "contract debts" provide the following "examples" of ways in which "[i]ndebtedness to the Government" arises (32 C.F.R. 163.99):

"(a) Damages or excess costs incident to defaults in performance;

(b) Breach of contract obligations concerning progress payments, advance payments, or Government-furnished property or material;

(c) Delinquency in rentals;

(d) Delinquency in payment of price of property purchased from the Government;

(e) Expense of correction of defects;

(f) Overpayments incident to errors in quantity, deficiencies in quality, or errors in billing;

(g) Retroactive price reductions resulting from contract provisions for price redetermination or for determination of prices under incentive type contracts;

(h) Delinquency in payment of charges for Government services;

(i) Delinquency in payment called for by agreement or arrangement for deferral or postponement of payments;

(j) Statutory renegotiation. * * *"

C. THIS COURT HAS CONSTRUED THE PRIORITY STATUTES AS NOT BEING LIMITED TO CLAIMS ENFORCEABLE IN A COMMON LAW ACTION FOR DEBT OR TO CLAIMS THAT HAVE FULLY MATURED OR ARE LIQUIDATED

The purpose of the federal priority statutes, this Court has held, "is not to be defeated by unnecessarily restricting the application of the word 'debts' within a narrow or technical meaning." *Price* v. *United States, supra,* 269 U.S. at 500; accord, *Bramwell* v. *United States Fid. & Guar. Co.,* 269 U.S. 483, 492. In holding that the term "debt" as used in another statute was not "restricted to demands enforceable in actions of debt," and covered unliquidated damages for breach of contract, this Court noted the broad meaning given to the term in English law and a variety of federal and state statutes. *Miller* v. *Robertson,* 266 U.S. 243, 249–250. Here, as in *Miller,* "[i]t would be unreasonable and contrary to the intention of Congress" to limit the term "debt" to "causes of action cognizable in debt under technical procedural rules." *Id.* at 250.

Rather, this Court has stated that the priority statutes apply to "[a]ll debtors to the United States, whatever their character, and by whatever mode bound * * *." *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 134. As Chief Justice Marshall stated in 1805, in upholding their constitutionality, taken in its "natural and usual sense" their language comprehends "every debtor of the public, however his debt might have been

contracted." *United States* v. *Fisher,* 2 Cranch 358, 385.[18]

Moreover, an interpretation of the priority statute under which only debts that could be recovered in a common law action for debt are entitled to priority would provide unsatisfactory guidance to persons administering the estates of debtors. If they erred in applying the hoary principles of pleading thus implicated,[19] they would risk personal liability for payments made on claims of other than the asserted debt of the United States. 31 U.S.C. 192. Alternatively, expensive and time-consuming litigation might be required before payments were made to any creditors, as in this case.

The Court has also held that the priority statutes are not limited to debts that have "matured" or are "liquidated" at the time the priority arises (*e.g.,* when the debtor dies, makes a voluntary assignment for the benefit of creditors, or commits an act of bankruptcy). For example, in *United States* v. *Bryan,* 9 Cranch 374, 386, the Court held that a deceased customs collector had been in debt to the United States at the time of his death, even though his account was not settled nor the amount of the indebtedness established until four years later. Similarly, in *United States* v. *State Bank, supra,* the Court explained, in a leading opinion by Justice Story, that the priority statutes apply not only to debts payable to the United States at the time of a person's insolvency or death, but also to debts "payable only *in futuro* * * *." *Id.* at 35–36. Noting the reference in the 1797 statute to the insufficiency of a decedent's estate "to pay all debts due from the deceased," the Court observed that in the settlement of estates of deceased persons "no distinction is ever taken between debts which are payable before or after their decease; the assets are equally bound for the payment of all debts." *Id.* at 36–37. The Court saw no basis for giving "debts due" a different meaning in regard to the debts of the United States. *Ibid.*[20] In other words, the Court construed "debts" as including any type of debt for which a debtor's estate might be held liable.

[18] In *Fisher* the Court held the federal priority applicable to the liability of an endorser of an unpaid foreign bill of exchange held by the United States without regard to whether the claim of the United States was cognizable in an action of debt. See generally Kyd, *Bills of Exchange* 175–202 (3d ed. 1795). In *Price* v. *United States, supra,* 269 U.S. at 500, where the Court held that taxes were "debts due" under the priority statutes, the Court mentioned that "an action of debt lies to recover taxes where the amount due is certain or readily may be made certain," but the context makes it clear that the Court did not mean to indicate that the statutes were limited to debts recoverable in an action for debt.

[19] We advert to, but need not address here, the additional complications that might arise concerning choice of the governing law.

[20] A century ago the Court characterized the priority statutes as follows (*Lewis* v. *United States,* 92 U.S. 618, 621):

"Those affected are persons 'indebted to the United States.'

"This language is general, and it is without qualification.

"The form of the indebtedness is immaterial.

"It may be by simple contract, specialty, judgment, decree, or otherwise by record. The debt may be legal or equitable, and have been incurred in this country or abroad. A valid indebtedness is as effectual in one form as another. No discrimination is made by the statute."

The Court added that its construction of the statutes as covering debts payable in the future was the same as that "practically acted upon by the government, as well as individuals, ever since its enactment" and that many estates of decedents and of insolvents "have been settled upon the footing of its correctness." *Id.* at 39.[21]

So well-established are these interpretations of the federal priority statutes—embodying principles antithetical to those applied by the court of appeals in this case—that in the past 150 years this Court and others have repeatedly applied those statutes, often without question in this respect, to debts due to the United States that were no more certain in amount at the critical date than those involved here. See, *e.g., King* v. *United States,* 379 U.S. 329, affirming 322 F. 2d 317, 321 (C.A. 3) (liability for excess costs to government due to termination of government contract for default); *United States* v. *Butterworth-Judson Corp.,* 269 U.S. 504 (claim in litigation for overpaid advances on terminated construction contract); *United States* v. *National Sur. Co.,* 254 U.S. 73 (same); *Employers' Liab. Assur. Corp.* v. *Astoria Mahogany Co.,* 6 F. 2d 945, 947 (C.A. 2) (liability on terminated war contract, amount not ascertainable till three years later); *Davis* v. *Michigan Trust Co.,* 2 F. 2d 194 (C.A. 6), affirmed *sub nom. Mellon* v. *Michigan Trust Co.,* 271 U.S. 236 (liability for transportation services rendered and conversion of a shipment of iron); *United States* v. *Flint Lumber Co.,* 87 Ark. 80, 112 S.W. 217 (liability for value of homestead land trees unlawfully cut).

[21] The debt in *State Bank* arose under a customs bond, which the Court held, alternatively, constituted at common law *debitum in praesenti, solvendum in futuro, i.e.,* an existing obligation payable at a future date (6 Pet. at 38), but the Court did not limit its discussion of debts payable in the future to such debts.

In *United States* v. *Barnes,* 31 F. 705 (C.C. S.D. U.Y.), the court held the federal priority statutes applicable to a claim by the United States based a pre-bankruptcy violation of the customs laws,[22] which was not reduced to judgment (for an amount far less than that claimed) until more than a year after the adjudication of bankruptcy and after the assignee in bankruptcy had distributed the assets to the other creditors. The assignee, who was aware of the government's uncertain claim when he made the distribution, was held personally liable for the amount distributed even though the government did not file a proof of claim until long thereafter. See also *United States* v. *Brunner,* 282 F. 2d 535 (C.A. 10), discussed at pp. 26–27, *infra.*

In sum, under the settled construction of 31 U.S.C. 191 and 192, the United States is entitled to priority for its debts even if at the time of the bankruptcy, assignment, death, etc., they are unliquidated or uncertain in amount,[23] or if they are in some sense contin-

[22] The government sought forfeiture of the value of goods fraudulently imported. See *In re Vetterlein,* 44 F. 57, 58 (S.D. N.Y.).

[23] No authority exists for Judge Coleman's suggestion in his concurrence that the government's "'claim' [did not] ripen into a 'debt due' * * * until the amount of the damages * * * had been ascertained by someone with the appropriate jurisdiction

gent.[24] Indeed, respondents concede that the court of appeals erred in requiring "that the obligation be presently payable at the time of insolvency" (Reply to Pet. 6).

to make a determination binding on both the claimant and the defendant" (Pet. App. A 19), a rule that not only would be contrary to established practice and precedent, but might foster unnecessary litigation.

[24] This Court's 5-to-4 decision in *Massachusetts* v. *United States*, 333 U.S. 611, is not to the contrary. There the Court held that once the federal priority attached (based there on the debtor's liability for federal unemployment compensation taxes) it could not be divested by the debtor's election, pursuant to the Social Security Act, to pay comparable state taxes and take a credit for up to 90 percent of the federal tax liability. In a dictum relied upon by Judge Coleman in his concurrence in this case (Pet. App. A 19), the Court observed that (333 U.S. at 626–627; footnotes omitted):

"if the taxpayer's subsequent election can destroy the priority retroactively, not only the priority but the 'debt' itself becomes contingent. And it is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of 'debts due' as of the time of insolvency.

"However this may be, we know of no previous application of § 3466 creating such a conditional priority. Nor do we see how one could be made consistently with the section's terms or purposes. The only such consistent application would seem to be one giving the Government the prior and indefeasible right to take the fund available, up to the amount necessary to pay its claim as of the date the priority attaches, not as it may be affected by later contingencies other than payment. In enacting § 3466 Congress gave no indication whatever of intent to create defeasible priorities."

The claim in *Massachusetts* of a "contingent" debt or "conditional priority" that was "defeasible" *at the debtor's option* is a very different matter from a defaulting contractor's indefeasible obligation to pay damages where the amount of that liability might depend upon actions taken *by the United States*.

D. LIABILITIES UNCERTAIN IN AMOUNT OR PARTLY CONTINGENT ARE GENERALLY TREATED AS "DEBTS" IN BANKRUPTCY AND OTHER PROCEEDINGS INVOLVING DEBTORS

The narrow, hypertechnical construction given the term "debts" by the court of appeals is contrary to the settled practice under federal and state law in handling "debts" owed by insolvents or deceased persons—areas of law made relevant by the priority statutes themselves and this Court's opinions construing them (see p. 21, *supra*).[25]

[25] Claims antedating a debtor's death that do not become absolute until thereafter, or are uncertain in amount, are generally enforcible against a decedent's estate (*e.g.*, Woerner, *American Law of Administration* § 394, at 1275–1276, 1278–1279 (3d ed. 1923); Tomlinson, *Administration of Decedents' Estates* § 19.4–5*d* (1972)), and the estate succeeds to contractual liabilities even if "the time for performance has not arrived, and the damages are uncertain." *Jones* v. *Cooper*, 2 Aikens 54, 57, 16 Am. Dec. 678, 681 (Sup. Ct. Vt.). The same rule applies in receivership proceedings. *E.g.*, *City of Bridgeport* v. *Aetna Indem. Co.*, 91 Conn. 197, 99 A. 566, 568–569 (Sup. Ct. Err.); II Tardy, *Smith on Receivers* § 594, at 1660–1661 (2d ed. 1920); 1 Clark, *Receivers* § 684, at 992–993 (2d ed. 1929). Similarly, with respect to general assignments for the benefit of creditors, the assignee may pay "[l]iabilities actually existing, although contingent in their character and not yet matured * * *." Bishop, *Insolvent Debtors* § 213 (3d ed. 1895). The assigned estate is liable for "damages resulting from the breach of a contract occurring prior to the assignment." *In re Chestnut St. Trust & Sav. Fund Co.'s* Assigned Estate, 217 Pa. 151, 154, 66 A. 332, 333. Claims for breach of contract, uncertain in amount, have also been held to be "debts" due under state insolvency statutes, operative when not preempted by federal bankruptcy laws. *E.g.*, *Lothrop* v. *Reed*, 95 Mass. (13 Allen) 294.

In the reverse situation, *i.e.*, a default by the United States under a contract to supply goods, the consequent debt of the United States, despite uncertainty about the amount, would normally be includable among the assets and property

Under the Bankruptcy Act, for example, a creditor is entitled to prove "debts" founded upon, *inter alia,* "contingent debts," "contingent contractual liabilities," and "claims for anticipatory breach of contracts, executory in whole or in part." 11 U.S.C. 103(a)(8), (9). See also 11 U.S.C. 506(1), (6), 707(2), 806(2), (7), 1006(1), (4).

A "contingent" or "unliquidated" proved claim may be allowed, moreover, so long as it is liquidated or estimated within a period specified by the bankruptcy court and "such liquidation or estimation would [not] unduly delay the administration of the estate * * *." 11 U.S.C. 93(d). Accordingly, a debt arising out of the bankruptcy's breach of contract may be proved and allowed, and is subject to discharge, even if the damages had not fully accrued or been fixed in amount when the bankruptcy petition was filed. *E.g., Central Trust Co.* v. *Chicago Auditorium Ass'n,* 240 U.S. 581, 591–593; *Maynard* v. *Elliott,* 283 U.S. 273, 278; *Brown* v. *O'Keefe,* 300 U.S. 598, 605–606.

That Emsco's liabilities under the three defaulted contracts would have been provable and entitled to priority in a bankruptcy proceeding is demonstrated by *United States* v. *Brunner,* 282 F. 2d 535 (C.A. 10). After failing to deliver the first installment of goods it had contracted to supply the United States, the

of the other party in bankruptcy proceedings (*e.g.*, 11 U.S.C. 110(a)(6)), receivership proceedings (*e.g.*, I Tardy, *supra*, at § 281), a general assignment for the benefit of creditors (*e.g.*, Burrill, *supra*, at 70–72, 354–355), and, in the case of an individual, the administration of his estate (*e.g.*, Woerner, *supra*, at § 306).

company filed a voluntary bankruptcy petition. Shortly thereafter the government declared the contract terminated for default and, as here, repurchased the goods elsewhere at a higher price. Reversing the referee's disallowance of the claim, the court held that when the petition was filed the United States had a provable debt for its damages which was entitled to priority. *Id.* at 539.[26]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1975.

[26] It was irrelevant in *Brunner* that the government's formal termination of the contract followed the filing of the petition, because the filing of the voluntary petition itself, which disabled the contractor from performing, constituted an anticipatory repudiation of the contract giving rise to a right of action for damages by the United States. *Id.* at 538, n. 3. See also *Central Trust Co.* v. *Chicago Auditorium Ass'n*, *supra*, 240 U.S. at 589–592. A general assignment for the benefit of creditors has the same effect, as it ordinarily "put[s] an end to the transaction of * * * business" by the debtor. Burrill, *supra*, at 490.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-687

UNITED STATES OF AMERICA,
Petitioner

v.

THOMAS W. MOORE, JR., Assignee for Benefit of Creditors of Emsco Screen Pipe Company of Texas, Inc., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT

PRELIMINARY STATEMENT

The Petitioner's brief has accurately related the opinions below, jurisdictional grounds, the statutes involved, and the question presented. An additional relevant statute is Tex. Rev. Civ. Stat., Art. 7269, which establishes a priority for the payment of state and city taxes, and which reads in relevant part as follows:

> "In all cases where a taxpayer makes an assignment of his property for the payment of his debts, or where his property is levied upon by creditors, by writs of attachment or otherwise, or where the estate of a decedent is or becomes insolvent, and the taxes assessed against such personal property, or against any of his estate remain unpaid in part or in whole, the amount of such unpaid taxes shall be a first lien upon all such property. . . ."

In brief, this case involves the Government's claim of absolute priority to the proceeds of the insolvency of Emsco Screen Pipe Company of Texas, Inc. ("Emsco"). The Assignee for Benefit of Creditors contends that the federal priority statute does not apply to the federal claims in the instant case because claims unliquidated at the time of insolvency are not "debts due" within the contemplation of the statute.

Reference is made to the stipulations of the parties and exhibits attached to such stipulations. (A. 32-42) In June, 1966, Emsco entered into contracts with various military agencies. Emsco defaulted, and the agencies terminated such contracts. On October 20, 1966, Emsco made a voluntary Assignment for Benefit of Creditors to the Defendant-Respondent, Thomas W. Moore, Jr., who continues to be the voluntary Assignee for the benefit of Emsco's creditors. While two of the claims were already terminated for default prior to such Assignment, the Army claim was not terminated until December 6, 1966. The United States had not liquidated its damages on any of the contracts prior to October 20, 1966, the date of the assignment for benefit of creditors. (A. 33-34)

The contingent, unliquidated nature of the claims of the United States can be seen best from the opinion of the Armed Services Board of Contract Appeals in regard

to the Navy claim. (A. 43) Through the Assignee, Emsco contended that there should be no excess costs because of the Government delay in authorizing progress payments and the precarious financial position of Emsco at the time of its bids. (A. 45) There was testimony that, immediately after the bid, Emsco requested progress payments, but through an oversight on the part of a governmental employee, the Government contracting officer ignored the request for approximately two and one-half (2½) months. (A. 47) Other testimony showed that the contracting officer erred in his required finding that Emsco had adequate financial resources to perform the contract, which under some circumstances could excuse performance by Emsco. (A. 61) The court held that these arguments did not excuse Emsco from excess costs because the errors of the contracting officer were made in good faith and were caused to some degree by Emsco. (A. 51-52; 61) Although the Court ruled against Emsco, the opinion shows that there were bonafide disputes, and accordingly, the damages on the Navy contract were highly contingent and unliquidated as of the time of the Assignment for Benefit of Creditors.

In addition to the amounts owing to the Government, Emsco owes approximately $7,000.00 to the City of Houston on a tax lien (A. 41) and $68,759.00 to 61 private creditors (A. 68-69). Assets available for distribution total $55,707.28. If the Federal priority statute applies, creditors other than the United States will receive nothing on their claims. If the Federal priority statute does not apply, after payment of the priority tax lien in favor of the City of Houston, the private creditors will receive approximately 30% on their claims and the United States will receive approximately 40% on its claims.

SUMMARY OF ARGUMENT

This case involves the interpretation of the term *debts due* within the insolvency-priority statute, 31 U.S.C. § 191, which reads in relevant part as follows: "Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied". This statute has been carried forward substantially unchanged in wording since its passage in 1797. Two Supreme Court cases have dealt with the matter indirectly, but appear to be inconsistent. One of the Supreme Court cases suggests that an unliquidated claim is not included in the term *debts due. Massachusetts v. United States,* 333 U.S. 611 (1948). The other Supreme Court case did not address itself to whether an unliquidated claim falls within the confines of *debts due* and the issue apparently was not before the court. *King v. United States,* 379 U.S. 329 (1964).

The Assignee contends that federal priority is so harsh on other creditors that it should be accorded only in those situations in which the statute clearly applies, such as in taxes, bonds, and other liquidated debts. Following the reasoning in *Massachusetts v. United States, supra,* one must look to the common law action of "debt" in giving substantive content to the term "debts due". At the time the statute was written, unliquidated claims were not considered "debts."

Priority does not apply in the instant case because the Governmental claims were unliquidated and unascertainable as of the time of the insolvency and accordingly were not "debts due" at that time. In the instant case, instead of a priority distribution to the United States, which would take all available funds, the United States should share with other creditors on a pro rata basis after payment of taxes.

ARGUMENT

THE UNITED STATES IS ENTITLED ONLY TO ITS PRO RATA SHARE OF THE DISTRIBUTABLE ASSETS BECAUSE ITS CLAIMS WERE NEITHER LIQUIDATED NOR ASCERTAINABLE AT THE TIME OF THE ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

A. Judicial Precedent Indicates That Unliquidated Claims Were Not Contemplated In The Term "Debts Due" In The Federal Priority Statutes.

In *Massachusetts v. United States,* 331 U.S. 611 (1948), an assignee for the benefit of creditors paid state unemployment taxes rather than Federal insurance contribution taxes. The state argued that the assignee was entitled to do so because of provisions in the Federal law allowing credit for monies paid to approve state unemployment funds. The Court held that the right to pay the state taxes and take credit for them was cut off by the insolvency, which gave rise to the priority statute. It reasoned that the priority of the United States was absolute and was not conditional, once insolvency had arisen. The Court reasoned further that applying credits to the Federal tax for the state tax, as urged by the Commonwealth of Massachusetts, would take the priority statute beyond the term "debts due to the United States" because it would establish a contingency at the time of the insolvency. The language on which the Assignee relies in this case is as follows:

> "A further effect might be to make the statute applicable beyond the scope of the term 'debts due to the United States'. For if the taxpayer's subsequent election can destroy the priority retroactively, not

> only the priority but the 'debt' itself becomes contingent. *And it is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of 'debts due' as of the time of insolvency.*" (emphasis added) 68 S.Ct. at 756.

It is clear that the priority statute is detrimental to other creditors of the debtor. In the instant case, for example, 62 other creditors of Emsco will receive nothing on their claims if priority applies. Because of the harshness on other creditors, priority should only be accorded in the instances in which the statute clearly applies, such as in taxes and other liquidated debts.

The Assignee asserts that the term "debts due" does not include contingent, unliquidated damages. Numerous authorities indicate that the term "debt" in a legal sense, refers to a liquidated claim or a sum certain. See 26 C.J.S. "Debt", Page 5 and 6. As pointed out in the court below, a common law action of "debt" pertained to a liquidated or certain sum. *United States v. Moore,* 497 F.2d 976, 978 (5th Cir. 1974) *citing* Stephen, Principles of Pleading, 8th Am. Ed. p. 13 (1859). *Massachusetts* itself pointed out in a footnote that in the long history of the statute that all the decisions sustaining the priority were for debts clearly due and owing and that Congress *"drew the line for its operation close to, if not at, the commonly accepted meaning of 'debt' as distinguished from other forms of obligation."* 68 S.Ct. at 756. A leading case interpreting the statute held that taxes were within the term "debts due". *Price v. United States,* 269 U.S. 492, 46 S.Ct. 180, 181 (1926). In its opinion, the Court gave strong support to the contention that "debts" mean liquidated claims by stating that "an action of *debt* lies to

recover taxes where *the amount due is certain or readily may be made certain."* 46 S.Ct. at 181. See also *Legett v. Southeastern Peoples College,* 68 S.E.2d 263, 267 (North Carolina, 1951) in which the court stated that "a debt due is a debt accrued, and a debt is accrued when all events have occurred which fix and determine the liability of the debtor to the creditor." In the instant case, the claims of the United States were unliquidated as of the time of the insolvency, and accordingly were not present debts within the contemplation of the statute.

Of course, Respondent does not argue that all the stringent requirements of the common law action of debt be applied. Respondent argues only that the term "debts due" must be interpreted in light of those common law actions in giving substantive content to such term. Since the term "debt" contemplated a sum certain or readily made certain in the common law action, it is reasonable to assume that a liquidated obligation was contemplated by the framers of the legislation.

The Government has attempted to create the impression that any judicial distinction between "debt" and "claim" is anachronistic. To the contrary, the distinction is still used in other statutes. For example, in determining whether interest was deductible in a tax case, the Fifth Circuit stated:

> "[W]henever it is uncertain whether anything will ever be demandable by virtue of the contract, it cannot be called a 'debt'. While the sum of money may be payable upon a contingency, yet it becomes a debt only when the contingency has happened, the term 'debt' being opposed to 'liability' when used in the sense of an inchoate or contingent debt." *United States v. Virgin,* 230 F.2d 880, 882 (5th Cir. 1956).

See also Tomlinson v. 1661 Corp., 377 F.2d 291, 295 (5th Cir. 1967).

Perhaps the most authoritative interpretation of the term "debts due" in the priority statute is found in an 1832 case by this Court in which the Court held that a bond in favor of the United States was a "debt" within the statute even though the maturity of the bond was after the insolvency. *United States v. The State Bank of North Carolina*, 6 Pet. 29 (1832). In the opinion, Justice Story indicated that the term was used in a common law sense and was to be interpreted in the sense of the common law maxim: *debitum in praesenti, solvendum in futuro.* 6 Pet. at 39. Translated, the phrase means a present debt, payable in the future.

In the common law usage, the phrase refers to an ascertained sum of money that was certainly and in all events payable at some time in the future. Examples of this type of obligation would be promissory notes and bonds. The type of obligation would be a sum certain or readily made certain by mathematical computation. The common law usage of the term did not include obligations wholly contingent for ultimate maturity and obligation upon the happening of later events, as opposed to the mere passage of time. *See Baltimore City v. Rice*, 50 Md. 302, 316 (Md., 1879); *People v. Arguello*, 37 Cal. 524, 525 (Cal. 1969); *Bank of Pennsylvania v. Wise*, 3 Watts 394, 401-403 (Pa., 1834); *Wood v. Partridge*, 11 Mass. 488, 493 (Mass., 1814); *Davis et al. v. Samuel Ham et al.*, 3 Mass. 33, 37 (Mass., 1807); *Wentworth v. Whittemore*, 1 Mass. 471, 472-473 (Mass., 1805).

For example, in one of the foregoing authorites, the court held that the potential wages of a sailor were not

subject to attachment in accordance with the statutory terms, because they were not really "debts" until the ship had landed, which was a later event, a contingency. *Wentworth v. Whittemore*, 1 Mass. 471, 472-473 (Mass., 1805). In the instant case, at the time of the Assignment for Benefit of Creditors, the damages owed by Emsco to the United States were wholly contingent for ultimate maturity upon the happening of later events and not the mere passage of time. There had to be a repurchase and re-letting of the contracts to liquidate damages. As of the date of the insolvency, it was possible there would be no damages or that Emsco would be excused from performance. One could not ascertain the prospective obligation by mathematical calculation, as in the case of a promissory note or a bond. There was no "debt" to which the United States was entitled to prior payment to the detriment of other creditors.

The majority and concurring opinions of the Court of Appeals properly looked to the common law for guidance in interpreting the term "debts due". Both opinions correctly focused on the question whether the amount of the obligation was certain or readily ascertainable at the time of insolvency. To that extent, the Court of Appeals decision is consistent with the interpretation of the term "debts due" by the Supreme Court in *Massachusetts* and *State Bank*. Certain language in the majority opinion below is perhaps too broad if interpreted to require that the obligation be presently payable at the time of insolvency; but that unfortunate language should not detract from the court's proper insistence that a "debt" within the statute must be a liquidated claim, in the sense of a certain sum or a sum readily ascertainable by mathematical computation. The addition of the "mathematical computation"

requirement allows the inclusion of debts payable after insolvency, such as promissory notes, bonds, etc. within the common law maxim, *debitum in praesenti, solvendum in futuro,* in accordance with the *State Bank* decision.

From the foregoing authorities, it seems clear that the term "debts due", as used in the priority statutes and as interpreted by Justice Story in the *State Bank* decision, was used in the common law sense of liquidated damages. Had the legislature intended to include torts, unliquidated damages, or other types of obligations, it would have used broader language such as "claims". It is a fair assumption that broader words were not used because of the harsh affect on other creditors of the insolvent.

B. Contrary Precedent Has Failed To Analyze Whether The Term "Debts Due" Includes Unliquidated Claims.

The Government relies on various cases that urge a liberal construction of the priority statutes, in order to protect the Government's purse, particularly in bankruptcy cases. The Court should not, however, go beyond the plain meaning of the words "debts due" as intended by Congress. As indicated in the *State Bank* case, the statute ought to receive a fair and reasonable interpretation, in accordance with the just import of its terms. 6 Pet. at 33. The meaning of the term "debt", and the early cases heretofore cited, indicate that the framers of the legislation probably intended the term "debts due" as some type of liquidated, present debt. *Massachusetts v. United States, supra,* 68 S.Ct. at 756; *The United States v. The State Bank of North Carolina,* 6 Pet. 29, 39 (1832).

In a separate concurring opinion below, Judge Coleman reasoned that Congress has considered the term "debt" adequate to the consummation of its fundamental purpose: to protect the Government's revenue. "It has been content to rely on *debts;* it has not seen fit to expand the language to include '*claims*' or such like." *United States v. Moore,* 497 F.2d 976, 979 (5th Cir. 1974) (emphasis added).

The argument of protecting the Government's purse has its strongest application in connection with tax revenues, which was one of the original purposes of the Act. *Price v. United States, supra,* 46 S.Ct. at 181. Taxes are "debts due" because they are reasonably liquidated claims; the amount due is certain or readily may be made certain. *Id.,* 46 S.Ct. at 181. The alleged events giving rise to the tax may be disputed; but, if they have occurred, the tax is ascertainable as of the particular time in question. Liquidation does not depend on events subsequent to the time in question, as in the instant case. Tax revenues are a revenue source that can be reasonably anticipated in the federal budget. In the instant case, the United States is not actually out any money because of the failure of Emsco because the contracts were relet at proper bids. It is doubtful that the fiscal policy of the United States depends to any substantial degree on damages gleaned from business failures of companies lacking business acumen. While it is true that government claims on contract defaults may be affected by the instant case, the more significant Government tax claims should be relatively unaffected.

The Respondent acknowledges that there are cases in which the court has assumed that priority applied to unliquidated claims. Such cases are of dubious precedential

value because of the lack of any reasoning, discussion, or authority. In many of the cases cited by the Government, it is unclear whether the court is even talking about priority or about unliquidated claims. For example, in the case of *United States v. Brunner,* 282 F.2d 535 (10th Cir., 1960), the matter before the court was whether the government's claim for breach of contract was a provable claim for purposes of set-off in bankruptcy. Contrary to the Government's assertions in its brief, the court said nothing about the matter of priority.

Of the authorities cited by the government, the case closest on its facts is *King v. United States,* 379 U.S. 329 (1964). There, this Court held the estate of a distributing agent liable for unliquidated breach of contract claims the United States had against the insolvent. The Court assumed that priority applied, and the matter whether claims unliquidated at the time of insolvency were entitled to priority was apparently not briefed. As in the other cases relied on by the Government, that issue simply was not before the Court. Such cases as *King* should not be binding on the instant case because of the failure of the attorneys to analyze and argue the question whether priority applied.

C. In The Instant Case, Fairness To All Creditors Requires Pro Rata Distribution.

In the instant case, the assets available for distribution total $55,708.28. If the United States is awarded a priority on those funds, other creditors, including suppliers of Emsco, will receive nothing on their claims. If the Supreme Court orders distribution on a pro rata basis

after payment of the approximate $7,000.00 tax lien in favor of the city of Houston, trade creditors will receive approximately thirty per cent (30%) on their claims and the United States will receive approximately a forty per cent (40%) recovery on its total claims. Because of the harshness on other creditors, priority should only be applied in those particular instances in which the priority statute clearly applies, such as in taxes, bonds, and other liquidated debts. Such a result is fair when one considers the significant adverse impact of the priority statutes on suppliers and other creditors of the insolvent, many of whom perhaps extended credit on the strength of the government contract. After all, such creditors had no opportunity to anticipate the extent of the possible governmental claims because of the unliquidated nature of such claims.

Much in the Government's brief concerns the applicability of the priority statutes in bankruptcy cases. The priority statutes operate to give a 5th class priority to the United States in matters of bankruptcy under the terms of 11 U.S.C. § 104(a). For purposes of determining priority, there would be no difference in an assignment for benefit of creditors and in a bankruptcy action. The first consideration has to be whether the priority statute applies. Thus, the same considerations of fairness to all creditors in the evaluation and recognition of unliquidated claims would be present in a bankruptcy case as in the instant case. Contrary to the rhetoric in the Government brief, the Assignee does not contend that the priority test in bankruptcy is different from that in other types of insolvencies. Rather, the Assignee contends that the determination is the same in all situations described by the

priority statute and depends on whether the amount of the obligation was ascertainable at the time of the insolvency.

It is important to distinguish between *recognition* of the Government's claims and *priority* of such claims. Certainly the Government's claims should be recognized in the instant case, though they were unliquidated at the time of the insolvency. There are implications in the Government's brief that the Assignee is attempting to cut off the Government's claim. To the contrary, the Assignee seeks to distribute the assets on a pro rata basis to all creditors, including the United States, after payment of the tax lien in favor of the city of Houston.

Even wholly contingent claims are recognizable in bankruptcy. 11 U.S.C. §103 (a) (8) (9). But to say a claim is recognizable does not mean it necessarily should be entitled to a priority over other similarly recognizable claims. In *State Bank, supra,* Justice Story argued by analogy to decedents' estates that unmatured *debts* were entitled to priority because such *debts* were recognizable in the probate of estates. 6 Pet. at 37. The Government has sought to extend that analogy by the citation of cases dealing with the recognition of unliquidated *claims.* The Government neglected the remaining portion of *State Bank* where Justice Story stated that the term "debts due" was to be understood by reference to the common law maxim, *debitum in Praesenti, solvendum in futuro,* which has been analyzed in the foregoing portions of this brief to indicate a definite, ascertained sum, payable in the future.

CONCLUSION

For the foregoing reasons and in the interest of fairness, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed, and the case should be returned to the trial court with instructions to enter judgment for the United States for its pro rata share of the distributable assets after payment of the tax lien in favor of the city of Houston.

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June 1975

CERTIFICATE OF SERVICE

Service was posted on opposing counsel by certified mail this 5th day of June, 1975.

THOMAS OSA HARRIS

OCT 6 1975

No. 74-687

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN AND PIPE COMPANY, AND EMSCO SCREEN AND PIPE COMPANY OF TEXAS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent incorrectly contends that the government's claims against the insolvent debtor, Emsco, were contingent and unliquidated at the time of the assignment and therefore not entitled to priority (Resp. Br. 9).

a. Emsco's liabilities to the government for breach of contract were not contingent. At the time of the assignment for the benefit of creditors, Emsco already had repudiated or otherwise defaulted on its obligations under all three contracts. Accordingly, its liability for

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breach of contract was not "contingent" on subsequent events. The fact of liability was fixed irrespective of whether the government would later choose to recontract with third parties, and that liability could have been enforced prior to the date of assignment in a suit for a declaratory judgment and damages. Cf. 32 C.F.R. 8.602–7(b); Uniform Commercial Code § 2–713. Only the appropriate measure of damages, not the fact of liability, could be said to have been uncertain on the latter date.[1]

The fact that respondent unsuccessfully contested Emsco's liability in an administrative proceeding after the assignment (Resp. Br. 2–3) does not indicate that the debt had previously been contingent. See, *e.g.*, *United States* v. *Butterworth-Judson Corp.*, 269 U.S. 504; *United States* v. *National Sur. Co.*, 254 U.S. 73.

[1] A private purchaser in the government's position would have had the right to choose, under the Uniform Commercial Code, adopted in Texas, between (1) "covering" by repurchasing, in which case the seller would be liable for the difference between the cost of covering and the contract prices, and (2) recovering from the seller the difference between the contract price and the market price when the buyer learned of the breach; the buyer would also be entitled in either case to recover incidental and consequential damages less expenses saved by the breach. Tex. Code Ann., Bus. and Commerce, §§ 2.712, 2.713, 2.715 (1967); Uniform Commercial Code §§ 2–712, 2–713, 2–715. Although these authorities are not directly applicable to government contracts, such contracts often embody similar principles. The instant contracts are not part of the record, which also does not specifically indicate the extent of any incidental or consequential damages suffered by the government. The critical factor here, however, is not the precise amount of the government's damages but the fact that Emsco's liabilities for whatever damages its breach had occasioned had already accrued on the date of the assignment and their amount could readily have been ascertained within a reasonable time.

Respondent concedes as much by agreeing that disputed tax claims are "debts due" entitled to priority (Resp. Br. 11). Nor was Emsco's liability rendered contingent by the theoretical possibility that "Emsco would be excused from performance" (Resp. Br. 9).[2] Of course, any debt that has accrued may subsequently be settled or even forgiven. If that possibility prevented a debt from becoming "due" under the priority statute, that statute would be rendered a nullity.

b. The precise amount of the government's damages had not been ascertained at the time of the assignment for the benefit of creditors. But as we point out in our main brief (pp. 9–24), neither reason nor precedent supports a reading of the priority statute that would exclude the government's claim on that account.

While professing not to argue that "all the stringent requirements of the common law action of debt" (Resp. Br. 7) must be applied in determining what is a "debt" under the priority statutes, respondent nevertheless relies heavily upon such common law actions (Resp. Br. 4, 7–9) in asserting that the statutes are inapplicable to debts that are unliquidated. But taxes, which respondent acknowledges as one of the principal categories of "debts" due to the United States that are entitled to priority, may also be unliquidated. Respondent argues that "[t]axes are 'debts due' because they are reasonably liquidated claims; the amount due is certain

[2] Respondent's related argument that "the United States is not actually out any money" because of Emsco's defaults (Resp. Br. 11) ignores the fact that when the contracts were relet after Emsco's defaults the government had to pay higher prices for the same goods that Emsco had contracted to supply (see Pet. Br. 5).

or readily may be made certain" (Resp. Br. 11). While that may often be so, it is not invariably the case; in many circumstances both the fact of the taxpayer's liability and the amount of that liability may be uncertain, yet such uncertainty does not prevent the federal priority from attaching. Cf. *United States* v. *Barnes,* 31 Fed. 705 (C.C. S.D. N.Y.); *United States* v. *Bryan,* 9 Cranch 374, 386–387. There is no intrinsic difference between "uncertain" tax debts and "uncertain" contract or other debts that warrants granting priority to the former but not the latter.

Moreover, respondent's acknowledgement that the priority attaches to "claims" for taxes (Resp. Br. 11) substantially undermines his contention that the priority statute applies to "debts" owed the United States by, but not "claims" of the United States against, a government contractor (*id.* at 7–8, 10).[3]

[3] Respondent's reliance (Resp. Br. 7–8) upon cases concerning what constitutes "indebtedness" of a taxpayer to another person for various purposes under the internal revenue laws is misplaced, for such cases turn on the particular language and purpose of the provisions involved. For the same reasons, respondent's reliance upon cases determining what constitutes a "debt" for varied purposes under state law (Resp. Br. 8–9) is also misplaced. The considerations that might lead a court to conclude, for example, that a sailor's claim for wages for a voyage was not a "debt" owing to him, and hence not subject to attachment by his creditors, until his voyage had been completed (see *Wentworth* v. *Whittemore*, 1 Mass. 471), would not necessarily support a conclusion that a different type of liability somewhat uncertain in amount is not a "debt" to which the federal priority attaches.

In any event, we do not contend that a distinction between "debts" and other "claims" is no longer appropriate in any circumstances, but only that the narrow common law definition of "debt" adopted by the court of appeals and proffered here by respondent

c. In an effort to avoid the weight of authority applying the priority statutes to "unliquidated" contract debts like Emsco's, respondent asserts that the cases say "nothing about the matter of priority" (Resp. Br. 12), referring specifically to *United States* v. *Brunner,* 282 F. 2d 535 (C.A. 10). In that case, however in reversing the disallowance of the government's contract debt as a priority claim in bankruptcy, the court of appeals specifically remanded "with instructions that * * * the United States [be] given the statutory priority for the balance of its claim." *Id.* at 539.[4]

2. Respondent also contends that application of the federal priority statutes to the debts created by Emsco's multiple defaults on defense contracts would be "harsh,"

is unwarranted by the language, purpose, history, and long-standing construction of the priority statutes. In this connection, we note that the current definition of "debt" in the Bankruptcy Act, 11 U.S.C. 1(14), includes broadly "any debt, demand, or claim provable in bankruptcy." This definition is unchanged from the original language enacted in 1898. 30 Stat. 544. The earlier bankruptcy acts also apparently rejected the narrow common law definition of "debt." 2 Stat. 32; 5 Stat. 444–445; 14 Stat. 525–526.

[4] Respondent also suggests that *United States* v. *State Bank of North Carolina,* 6 Pet. 29, stands for the proposition that the term "debt" in the priority statute "was to be interpreted in the sense of the common law maxim: *debitum in praesenti, solvendum in futuro*" (Resp. Br. 8). But the Court in that case first construed the language of the priority statute as including within the term "debts due" at insolvency all "debt[s] then arising to the United States, whether then payable, or payable only *in futuro.*" 6 Pet. at 36. It was only after analyzing why the statute should properly ~~be a debt due even under the principle of *debitum in praesenti*~~ estate would be held liable to the United States that the Court noted that the custom house bond at issue in that case would also be a debt due even under the principle of *debitum in praesenti, solvendum in futuro. Id.* at 39.

be read as including any type of debt for which the debtor's

"detrimental," and "unfair" to Emsco's other creditors (Resp. Br. 4, 6, 10, 12–14). Presumably creditors in competition with the government would invoke those epithets in opposition to any application of the priority statute. But the wisdom of the priority statute as a matter of social policy is a question for Congress to decide. And, as this Court has repeatedly acknowledged, Congress has made and long adhered to the legislative judgment that the needs of the government outweigh any attendant harshness for non-prioity creditors, a judgment that this Court has effectuated by liberally construing the statutory grant of priority (see, *e.g.*, Pet. Br. 14–16, 19–22).[5]

At bottom, respondent's claim of harshness is directed at the general operation of the priority statute and not to any equitable considerations uniquely or even especially present in this case.[6] Respondent has

[5] Respondent speculates that the government's fiscal policy does not depend to any substantial degree on contract debts (Resp. Br. 11). But it could likewise be said that the fisc is not substantially dependent upon the application of the priority statute to tax debts, because only a relatively small proportion of the government's revenues are accounted for by tax debts collected pursuant to the priority statutes. In both cases, however, the need to apply the priority statute at all arises only in exceptional circumstances—insolvency, bankruptcy, *etc.*—and within that context there is no less reason to apply the priority statutes to contract debts than to tax debts. In any event, Congress has made no distinction in 31 U.S.C. 191 between various types of debts owed to the United States.

[6] Respondent asserts that other creditors who "perhaps extended credit on the strength of the government contract * * * had no opportunity to anticipate the extent of the possible governmental claims because of the unliquidated nature of such claims" (Resp. Br. 13). However, the record here does not support the suggestion that any creditors were misled into extending credit because they were ignorant of the government's claims. All of the creditors'

not shown that creditors are any more harshly or adversely affected by application of the priority statute to debts that are unliquidated on the date of insolvency than to debts that are liquidated or otherwise certain in amount.

For the reasons stated in our opening brief and in this reply, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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claims were based on transactions preceding Emsco's assignment for the benefit of creditors on October 20, 1966, and those creditors would have been in the same position if on or shortly before that date the government had reprocured to cover Emsco's defaults, thereby fixing the amount of damages.

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